Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1974

No. 73-1765

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,

Appellants,

vs.

JOHN C. PITTINGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,

Appellees,

and

JOSE DIAZ and ENILDA DIAZ, his wife, et al.,

Intervening Parties Appellees.

JURISDICTIONAL STATEMENT

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In The

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October, 1974 Term

No.

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL and AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,

Appellants,

vs.

JOHN C. PITTINGER, as Secretary of Education of the Commonwealth of Pennsylvania and GRACE M. SLOAN, as Treasurer,

Appellees,

JOSE DIAZ and ENILDA DIAZ, his wife, on their own behalf and as guardians of their minor children, Dalila, Jose, Jr., and Sergio Diaz; WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, on their own behalf and as guardians of their minor child, Rochelle Zimmerspitz; THOMAS J. HASSALL and MARIE HASSALL, his wife, on their own behalf and as guardians of their minor child, Patricia Anne; DANIEL F. X. POWELL and ANNA T. POWELL, his wife, on their own behalf and as guardians of their minor children, Kathleen A. and Daniel F. X., Jr.; SETH W. WATSON, JR. and ANNE P. WATSON, his wife,

on their own behalf and as guardians of their minor child, Ellen P.; JOHN P. CHESICK, on his own behalf and on behalf of his daughter, Emily; MRS. ROBERT BOOZER, on her own behalf and on behalf of her daughter, Debra McKissick and the Springdale School on behalf of its students,

Intervening Parties Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

JURISDICTIONAL STATEMENT

The appellants herein submit this statement to show that this Court has jurisdiction of their appeal from that part of the final order entered in this action on the 7th day of March, 1974, which denies the plaintiffs' application for a petition for injunction (a) against the expenditure of Commonwealth funds pursuant to Act 194, (b) against the expenditure of Commonwealth funds pursuant to Act 195 for the loan of textbooks, (c) against the expenditure of Commonwealth funds pursuant to Act 195 for the loan of instructional materials, and (d) against the expenditure of Commonwealth funds pursuant to Act 195 for instructional equipment which "from its nature cannot readily be diverted to religious purposes and is particularly designed or designated for such secular educational purposes as provided for in said statute and its duly promulgated guidelines for the administration of such statute."

OPINION BELOW

The opinions of the three-judge statutory court are as yet unreported. Copies are set forth as Appendix A hereto beginning at page 1a.

JURISDICTION

This suit was commenced by the appellants herein pursuant to United States Code, Title 28, Sections 1331, 1343(3), 2281, 2283 and 2202. The complaint challenges the constitutionality of two Pennsylvania statutes, Act 194, July 12, 1972, Pa. Stat. Tit. 24, Section 9-972 (hereinafter Act 194) and Act 195, July 12, 1972, Pa. Stat. Tit. 24, Section 9-972 (hereinafter Act 195). The defendants are the Secretary of Education and the Treasurer of the Commonwealth of Pennsylvania. After the suit was commenced a number of parties having varying interests were permitted to intervene as defendants.

A copy of the final order of the District Court, entered on March 7, 1974, is set forth as Appendix B hereto, at page 102a. The appellants' notice of appeal was filed in the District Court on March 21, 1974 and a copy thereof is set forth as Appendix C hereto, at page 105a.

The jurisdiction of this Court to review the order by direct appeal is conferred by Title 28, United States Code, Section 1253. Decisions of this Court upholding jurisdiction include *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

STATUTES INVOLVED

Acts 194 and 195 are set forth as Appendix D hereto, beginning at page 107a.

QUESTIONS PRESENTED

1. Does Act 194, which authorizes the expenditure of Commonwealth funds to provide auxiliary services in religious elementary and secondary schools, violate the Establishment Clause of the First Amendment to the United States Constitution?

2. Does Act 195 violate the Establishment Clause of the First Amendment insofar as it authorizes the use of Commonwealth funds to purchase, for use in religious elementary and secondary schools, (a) textbooks, (b) instructional materials, and (c) instructional equipment which "from its nature cannot be readily diverted to religious purposes"?

STATEMENT OF THE CASE

The statutes challenged in this suit are the most recent in a series of laws enacted by the Pennsylvania Legislature in a continuing effort to provide tax-raised funds for the support of religious and other private schools. [1] Paragraph

1. Previous efforts included the "purchase of services" law invalidated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and the "tuition reimbursement law," invalidated in *Sloan v. Lemon*, 413 U.S. 825 (1973). Also challenged in the present suit was Act 204, which amended the latter law by increasing from 5 to 10% of the Cigarette Tax revenue the amount to be appropriated for payment of the tuition reimbursements. Act 204 was signed into law after the District Court had declared the statute unconstituional. This Court's affirmance of the District Court's decision rendered that part of the complaint herein moot.

8 of the complaint herein alleges and the defendants concede (see *infra*, p. 62a-63a) that included as eligible under the Acts are schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

Act 194 deals with auxiliary services which are defined (in section 1(b)) as:

> ". . .guidance, counseling and testing services; psychological services; services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth."

Textbooks are provided for in Act 195 and are defined, in section 1(b):

> " 'Textbooks' means books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group. Such textbooks shall be textbooks which are acceptable for use in any public, elementary, or secondary school of the Commonwealth."

Instructional materials and instructional equipment are also provided for in Act 195. The former are defined as follows:

> " 'Instructional materials' means books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparencies, films, filmstrips, kinescopes and video tapes, or any other printed and published materials or a similar nature made by any method now developed or hereafter to be developed. The term includes such other secular, neutral, non-ideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth."

Instructional equipment is defined as follows:

> " 'Instructional equipment' means instructional equipment, other than fixtures annexed to and forming part of the real estate, which is suitable for

> and to be used by children and/or teachers. The term includes but is not limited to projection equipment, recording equipment, laboratory equipment, and any other educational secular, neutral, non-ideological equipment as may be of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth."

A three-judge court was duly convened and the plaintiffs moved for a preliminary injunction. At the hearing on the motion, held on September 10, 1973, the Court directed that the trial of the action on the merits be advanced and consolidated with the hearing on the motion.

On March 7, 1974 the Court handed down its decision as follows:

1. A majority of the Court (Circuit Judge Gibson and District Judge Bechtele) upheld the constitutionality of Act 194. District Judge Higgenbotham dissented.

2. With Judge Higgenbotham's extremely reluctant concurrence (see *infra*, page 76a), the Court unanimously upheld the textbook provision of Act 195.

3. With Judge Higgenbotham dissenting, the Court upheld the instructional materials provision of Act 195.

4. With Judge Higgenbotham dissenting, the Court upheld the constitutionality of so much of Act 195 as authorized the expenditure of Commonwealth funds for

religious school use of instructional equipment which "from its nature cannot be readily diverted to religious purposes, and is particularly designed or designated for . . .secular educational purposes provided for in . . . [the] statute and its duly-promulgated guides for the administration of such statute."

5. The Court unanimously held unconstitutional so much of Act 195 as authorized expenditure of Commonwealth funds for religious school use of other instructional equipment. The Court's order enjoined the defendants from expending Commonwealth funds for the loaning of such instructional equipment and directed them to file amended guidelines describing the types of permissible equipment they intend to provide for non-public schools. (See *infra*, page 103a).

THE QUESTIONS ARE SUBSTANTIAL

1. The District Court placed considerable reliance for its decision on *Tilton v. Richardson*, 403 U.S. 672 (1971) and *Hunt v. McNair*, 413 U.S. 472 (1973). However, as Judge Higgenbotham noted in his dissenting opinion (*infra*, p. 94a) each of these cases involved "(1) a 'one-time, single-purpose construction grant'; (2) to a *college* whose students are less impressionable and where presumably less emphasis is placed on religious indoctrination; and (3) where the nature of the program entails limited government surveillance in order to fully comport with the First Amendment guarantees." We add that in no case since *Tilton* has that decision (or *Hunt*) been relied upon by this Court to justify an expenditure of public funds in religious schools on the elementary and secondary level.

2. Two decisions of this Court, both before 1971, upheld expenditures at the elementary and secondary school level: *Everson v. Board of Education*, 330 U.S. 1 (1947) (bus transportation), and *Board of Education v. Allen*, 392 U.S. 236 (1968) (textbooks). Both are relied upon by the District Court, but the key to the resolution of the present case is the following from this Court's opinion in *Sloan v. Lemon*, 93 S. Ct. 2982, 2986-87 (1973):

> " . . .Such benefits [as allowed in Everson and Allen] were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the 'verge' of the constitutionally impermissible. . . . In *Lemon* we declined to allow Everson to be used as the 'platform for yet further steps' in granting assistance to 'institutions whose legitimate needs are growing and whose interests have substantial political support' . . . . *Again today we decline to approach or overstep the 'precipice' of establishment against which the Religion Clauses protect.*" (Citations omitted. Emphasis added.)

That *Everson-Allen* represents the verge beyond which the Court, at least until the present, has not been prepared to go, is evidenced by the fact that in every post-1968 case involving aid at the elementary and secondary school level it has held the challenged statute to be unconstitutional: *Lemon v. Kurtzman, supra; Earley v. DiCenso*, 403 U.S. 602 (1971); *Johnson v. Sanders*, 319 F. Supp. 421, aff'd, 403 U.S. 955 (1971); *Committee for Public Education and*

Religious Liberty, supra; Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973); *Sloan v. Lemon, supra; Wolman v. Essex*, 342 F. Supp. 399, aff'd, ____U.S.___, 93 S.Ct. 61 (1972); *Kosydar v. Wolman*, 353 F. Supp. 744, *aff'd sub. nom. Grit v. Wolman*, ____U.S.___, 93 S.Ct. 3062 (1973). See also, *Norwood v. Harrison*, ___U.S.__, 93 S.Ct. 2804 (1973).

3. Two courts other than the court below have considered statutes similar to those challenged in this action and have concluded that they go beyond the verge of constitutionality. In *Public Funds for Public Schools of New Jersey v. Marburger*, 358 F. Supp. 29 (1973), a three-judge district court unanimously held violative of the Established Clause a statute which is constitutionally indistinguishable from the combination of Acts 194 and 195 herein. In *Klinger v. Howlett*, 56 Ill. 2d 1, 305 N.E. 2d 129 (1973) the Supreme Court of Illinois held unconstitutional the State's "Nonpublic State Parental Grant Act of 1972" which provided for textbooks and auxiliary services in nonpublic schools.

4. We do not agree with the statement in the majority opinion of the court below (*infra*, page 11a) that we are dealing in this litigation "with four separate programs." We suggest that Acts 194, 195 and 204 constitute a single-package designed to recoup for the religious schools what was lost to them by virtue of *Lemon* and *Sloan*. Both in *Public Funds v. Marburger* and *Klinger v. Howlett* the courts viewed the respective statutes as a whole and

adjudged them unconstitutional as a whole. [2] In our statement of "Questions Presented" herein we have, for convenience of treatment, listed the two acts separately. For the same reason we deal separately with the four non-moot programs in the legislature's three-act package.

5. *Auxiliary Services.* For the reasons fully expounded in Judge Higgenbotham's dissenting opinion, the District Court's opinion in *Public Funds v. Marburger* and the Illinois Supreme Court's opinion in *Klinger v. Howlett*, we submit that Act 194 cannot stand. The Pennsylvania Legislature has not nor can it avoid both the Scylla of aid and the Charybdis of entanglement.

Act 194 is open-ended. It defines auxiliary services to include "such other secular, neutral, non-ideological services as are of benefit to non-public school children . . . ." The Regulations adopted by the State Board of Education to implement the Act interpret this to include instructional services for bringing pupils below grade to grade level. [3]

---

2. In *Klinger v. Howlett*, as in the present case, the legislative package consisted of three acts: the "Nonpublic State Parental Grant Act," the "Nonpublic State Parental Grant Plan for Children of Low Income Families," and the "Illinois Educational Development Board Act." The court ruled the first two acts unconstitutional but did not rule on the third because no steps had been taken to implement it. In the present case, because of mootness the District Court did not pass on Act 204.

3. Regulation 1.11 reads: "*Services for the improvement of educationally disadvantaged* shall include but are not limited to those services necessary to assist a student to perform at the grade level for his age and potential." *Infra*, page 30a.

Every school, as part of its normal operations, provides instructional services to below grade level students to bring them up to grade level and to assist them to perform at the grade level for their age and potential. Indeed, there are very few schools in which every pupil is at or above grade level in every subject taught, and it is doubtful that any school fails to provide services to the pupils to bring them up to grade level in each subject. Whatever additional expense is involved is a normal part of the school's operating budget. By relieving the nonpublic schools of this part of their operating costs, the Commonwealth of Pennsylvania is subsidizing the normal operations of nonpublic schools, including those which have as their purpose the teaching, propagation and promotion of a particular religious faith, are an integral part of the religious mission of the sponsoring church, and have as a substantial or predominating purpose the inculcation of religious values.

Act 194 seeks to limit publicly financed services to such as are "secular, neutral, and non-ideological"; it could hardly do otherwise in view of the restrictions of the First Amendment. But how can the State make sure, as it must, that the subsidized teachers do not inculcate religion? It can only do so by that "comprehensive, discriminating, and continuing state surveillance" which the Court held in *Lemon* is forbidden by the Establishment Clause (403 U.S. at 619). We can see no constitutional distinction between teaching "secular, neutral, and nonideological" subjects to grade level students in church schools and teaching them to students below grade level in the same schools. In *Lemon*, the Court held the former to be unconstitutional; we submit, the latter is equally unconstitutional.

In *Walz v. Tax Commission*, 397 U.S. 664, 676 (1970), the Court warned against "governmental grant programs [which] could encompass sustained and detailed administrative relations for enforcement of statutory and administrative standards." Act 194, we submit, requires for its implementation just such sustained and detailed administrative relationships between church and state.

6. *Textbooks.* The District Court relied upon *Allen* for its determination that the textbook provision of Act 195 does not violate the Establishment Clause. In his opinion, Judge Higgenbotham detailed the significant differences between *Allen* and the present case and showed, that,unlike *Allen*, the textbook provision and the guidelines adopted for its implementation propel the Commonwealth into "sustained and detailed administrative relations," and entail "comprehensive, discriminating and continuing state surveillance." (*Infra*, page 74a). Moreover, Judge Higgenbotham was troubled by serious question whether "the books are in fact loaned directly to children as in *Allen* or really if this portion of the Act is merely nothing more than an elaborately contrived subterfuge designed to principally aid nonpublic schools which are fundamentally and preponderately church-related." (*Infra*, page 75a).

Nevertheless, Judge Higgenbotham decided to resolve the question of constitutionality in favor of the statutory provision. We submit that this was error.

7. *Instructional Materials.* These clearly go beyond the verge of *Allen* and the New York statute it upheld. Certainly, the principles of advancement of religion, administrative entanglement, and political entanglement

and religious divisiveness (the latter stated in *Lemon* and amplified in Part III of *Nyquist* and Footnote 7 in *Sloan*), are all applicable to the provisions of Act 195. Moreover, and most important, the Pennsylvania Legislature itself made a distinction between textbooks and everything else. Section 922-A(c) in providing for "loan of textbooks" requires that loans be made to children "upon individual request." Subdivision (c), on the other hand, provides that the loans of other materials, supplies and equipment be made to the nonpublic schools on *their* request. In *Allen*, the Court stressed that under the statute "no funds or books are furnished the the parochial schools," (392 U.S. at 243-244), and found it "in conformity with the Constitution, for the books are furnished for the use of individual students at their request." *Ibid.*, Footnote 6. This is not the case under Act 195 in respect to anything other than testbooks.

The crux of the matter is that Act 195 encompasses schools whose purpose it is to advance religion. In order to achieve this purpose the schools must provide instruction in secular subjects. Part of the budget of the schools is the expenditure of funds for instructional materials. When the State supplies these schools with the materials the effect thereof is to advance religion to the same extent as if it provided them with funds to purchase the materials or reimbursed parents for the tuition paid by them to the schools to enable the latter to purchase the materials. In short, it constitutes a State subsidy for the operations of religious schools. This, we submit, the Establishment Clause forbids.

8. *Instructional Equipment.* The District Court sought to distinguish between permissible and nonpermissible instructional equipment and allowed such equipment which "from its nature cannot readily be diverted to religious purposes, and is particularly designed or designated for such secular purposes as provided for in said statute and its duly promulgated guidelines for the administration of such statute."

For the reasons stated in respect to instructional materials we believe this distinction, even if feasible, would not save the provision. But there is an additional constitutional flaw in respect to instructional materials even of the restricted type permitted by the District Court. An examination of the revised guidelines issued by the Commonwealth in compliance with the District Court's decision indicates that with but moderate resourcefulness much of the permissible equipment can be used for religious purposes or converted for such use. Industrial arts equipment, for example, can be used to construct crosses, crucifixes and altars; and storage cabinets and carts can be used to store and move religious materials. The only way to safeguard against this, and the decisions of this Court have made it clear that the Establishment Clause requires such safeguards, is that continuing surveillance which the Establishment Clause itself forbids.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should note probable jurisdiction in this case.

Dated: May 17th, 1974

Respectfully submitted,

s/ William P. Thorn

s/ Leo Pfeffer

Attorneys for Appellants

APPENDIX A
OPINION OF THREE-JUDGE STATUTORY COURT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL and AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,

Plaintiffs,

v.

JOHN C. PITTINGER, as Secretary of Education of the Commonwealth of Pennsylvania and GRACE M. SLOAN, as Treasurer,

Defendants,

JOSE DIAZ and ENILDA DIAZ, his wife, on their own behalf and as guardians of their minor children, Dalila, Jose, Jr., and Sergio Diaz; WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, on their own behalf and as guardians of their minor child, Rochelle Zimmerspitz; THOMAS J. HASSALL and MARIE HASSALL, his wife, on their own behalf and as guardians of their minor child, Patricia Anne; DANIEL F. X. POWELL and ANNA T. POWELL, his wife, on their own behalf and as guardians of their minor children, Kathleen A. and Daniel F. X., Jr.;

Opinion

SETH W. WATSON, JR. and ANNE P. WATSON, his wife, on their own behalf and as guardians of their minor child, Ellen P.; JOHN P. CHESICK, on his own behalf and on behalf of his daughter, Emily; MRS. ROBERT BOOZER, on her own behalf and on behalf of her daughter, Debra McKissick and the Springdale School on behalf of its students,

Intervening Parties Defendants.

Before:

John J. Gibbons, Circuit Judge
A. Leon Higginbotham, Jr., District Judge
Louis Charles Bechtle, District Judge

Appearances:

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Opinion

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By: HENRY T. REATH, Esq.
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Attorneys for Intervenors Powell, Watson, Chesick, Boozer, Pennsylvania Association for Independent Schools and Springside School.

GIBBONS, Circuit Judge

In this action the plaintiffs challenge the constitutionality of two Pennsylvania statutes, Act 194, July 12, 1972, Pa. Stat. tit. 24, Sec. 9-972 and Act 195, July 12, 1972, Pa. Stat. tit. 24, Sec. 9-972. Both are claimed to transgress the first amendment in two separate respects, set forth as separate counts in the complaint. The First Count alleges that the statutes violate the establishment clause. The Second Count alleges that the statutes constitute compulsory taxation for the support of religion or religious schools and thereby interfere with the plaintiffs' free exercise of their religion in violation of the free exercise clause. In both counts the complaint seeks an injunction against the expenditure of any funds pursuant to either statute. A three-judge district court was convened pursuant to 28 U.S.C. Sections 2281-84. The case is before that court on final hearing.

Opinion

I. THE PARTIES

There are three individual and four organizational plaintiffs. The individual plaintiffs are Sylvia Meek, Bertha G. Myers and Charles A. Weatherley, each of whom is a resident taxpayer of the Commonwealth of Pennsylvania. The organizational plaintiffs, American Civil Liberties Union, National Association for the Advancement of Colored People, Pennsylvania Jewish Community Relations Council, and Americans United for Separation of Church and State, each has members who are taxpayers of the Commonwealth.

The original defendants are John C. Pittinger, Secretary of Education of the Commonwealth and Grace M. Sloan, Treasurer of the Commonwealth.

A number of parties having varying interests were permitted to intervene as defendants. The individual intervening defendants include parents of children who are receiving benefits under one or both statutes. Of these, the defendants John P. Chesick, Mrs. Robert Boozer, Seth W. Watson, Jr. and Anne P. Watson are parents of beneficiary children who attend nonpublic nonsectarian schools in Pennsylvania. The defendants Jose Diaz, Enilda Diaz, William Zimmerspitz, Nancy Zimmerspitz, Thomas J. Hassall, Marie Hassall, Daniel F. X. Powell and Anna T. Powell are parents of beneficiary children attending nonpublic church-related schools in Pennsylvania. One minor child of two of the intervening defendants is a mentally retarded child attending a church-related school for exceptional children. The defendant Pennsylvania

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Association of Independent Schools is an organization of nonpublic nonsectarian schools attended by students who qualify as beneficiaries under the challenged acts. The defendant Springside School is a nonpublic nonsectarian school attended by students who qualify as beneficiaries under the challenged statutes.

II. THE PLEADINGS AND THE RECORD

Under the Court's supervision the parties engaged in extensive pretrial negotiations which led to the entry of a joint final pretrial order containing twenty-eight stipulations of fact, a list of exhibits which were ultimately received in evidence, and a list of potential witnesses. At a hearing on plaintiffs' motion for a preliminary injunction on September 10, 1973 the testimony of some of these witnesses was received. Pursuant to Rule 65(a)(2) the Court directed that the trial of the action on the merits be advanced and consolidated with the hearing on that application. The plaintiffs were afforded the opportunity to supplement the testimony offered on September 10, 1973, but elected to rest on that record. Thus the case is before us on final hearing on the pleadings, the stipulations set forth in the joint final pretrial order and the evidence received at the hearing on September 10, 1973. This opinion comprises our findings of fact and conclusions of law.

III. THE STATUTES INVOLVED

Acts 194 and 195, both of which became law on July 12, 1972, are amendments to the Pennsylvania Public School Code of 1949, Pa. Stat. tit. 24, Sections 1-101 to

27-2702, which embodies the Commonwealth's comprehensive scheme for educating all children of elementary and secondary school age. The Code defines compulsory school age as not later than eight years and until seventeen years of age, Pa. Stat. tit. 24, Section 13-1326. It provides:

> "Every parent, guardian, or other person having control or charge of any child or children of compulsory school age is required to send such child or children to a day school in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language." Pa. Stat. tit. 24, Section 13-1327.

The Code recognizes that the requirements of the compulsory attendance law may be met at a nonpublic school so long as the subjects and activities in such school meet the standards of the State Board of Education and are taught in the English language. *Id.* The only exceptions to compulsory school attendance are those set forth in Pa. Stat. tit. 24, Section 13-1330. These include certain children fourteen years of age or older to whom employment certificates have been issued under authority of the Superintendent of Public Education, and children who have been found, after examination, to be so mentally retarded as to be unable to profit from further school attendance. The Commonwealth imposes the requirements of licensing and inspection by a State Board of Private Academic Schools on the nonpublic schools here involved, except for those operated by or under the authority of

bona fide religious institutions. Pa. Stat. tit. 24, Sections 2731-43. It imposes on principals and teachers in all schools, public and nonpublic, nonsectarian or religious, the duty of reporting to the district school superintendent the names and addresses of all children enrolled, and any failure of the children to attend school in compliance with the compulsory attendance law. Pa. Stat. tit. 24, Section 13-1332. This reporting provision is enforced by a criminal sanction. Pa. Stat. tit. 24, Section 13-1355. The Code evidences the strong public policy of the Commonwealth that every child of compulsory school age be educated for functional adult citizenship to the level of minimum state standards. Under various provisions of the Code the Commonwealth has provided to pupils attending public schools, through several levels of state and local officials, certain auxiliary services aimed at the achievement of such a minimum level of educational achievement. To the same end, under other provisions of the Code it furnishes to pupils attending public schools textbooks, instructional materials and instructional equipment.

Act 194 provides that acting through the same state and local officials as in the case of pupils attending public schools, the Commonwealth will provide auxiliary services

> "...to all children who are enrolled in grades kindergarten through twelve in nonpublic schools wherein the requirements of the compulsory attendance provisions of this act may be met and which are located within the area served by the intermediate unit, such auxiliary services to be provided in their respective schools."

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The Intermediate Units referred to are established by another part of the Code. All public school districts in the Commonwealth are assigned to one of twenty-nine such units which have the function of furnishing auxiliary services to such school districts. Pa. Stat. tit. 24, Sections 9-951 to 9-971. These services include but are not limited to curriculum development and instructional improvement services, educational planning services, instructional materials services, continuing professional education services, State and Federal agency liaison services, management services, classes and schools for exceptional children, audio-visual libraries and instructional materials centers. Pa. Stat. tit. 24, Section 9-964. The Commonwealth finances these services. Pa. Stat. tit. 24, Sections 9-957, 9-970.

Act 194, section 1(b), defines auxiliary services as:

> "guidance, counseling and testing services; psychological services; services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth."

All the auxiliary services listed in Section 1(b) are presently provided for public school children at public expense either through the Intermediate Units or through local public school districts.

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Act 195, section 1(c) provides:

> "Loan of Textbooks. The Secretary of Education directly, or through the intermediate units, shall have the power and duty to purchase textbooks and, upon individual request, to loan them to all children residing in the Commonwealth who are enrolled in grades kindergarten through twelve of a nonpublic school wherein the requirements of the compulsory attendance provisions of this act may be met. Such textbooks shall be loaned free to such children subject to such rules and regulations as may be prescribed by the Secretary of Education."

Textbooks are defined in section 1(b):

> " 'Textbooks' means books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group. Such textbooks shall be textbooks which are acceptable for use in any public, elementary, or secondary school of the Commonwealth."

Section 1(d) limits the state's obligation to purchase textbooks for loan to nonpublic school students to a total amount not exceeding ten dollars multiplied by the number of children enrolled in nonpublic schools.

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Act 195, section 1(e) provides:

> "Purchase of Instructional Materials and Equipment. Pursuant to requests from the appropriate nonpublic school official on behalf of nonpublic school pupils, the Secretary of Education shall have the power and duty to purchase directly, or through the intermediate units, or otherwise acquire, and to loan to such nonpublic schools, instructional materials and equipment, useful to the education of such children, the total cost of which, in any school year, shall be an amount equal to but not more than twenty-five dollars ($25) multiplied by the number of children residing in the Commonwealth who on the first day of October of such school year, are enrolled in grades kindergarten thorough twelve of a nonpublic school in which the requirements of the compulsory attendance provisions of this act may be met.

Instructional materials and instructional equipment are defined in section 1(b):

> " 'Instructional materials' means books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparencies, films, filmstrips, kinescopes, and video tapes, or any other printed and published materials of a similar nature made by any method now developed or

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> hereafter to be developed. The term includes such other secular, neutral, non-ideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.
>
> 'Instructional equipment' means instructional equipment, other than fixtures annexed to and forming part of the real estate, which is suitable for and to be used by children and/or teachers. The term includes but is not limited to projection equipment, recording equipment, laboratory equipment, and any other educational secular, neutral, non-ideological equipment as may be of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

Both acts have an identical severability clause:

> "If any part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

Thus each program under both statutes must be considered separately, both facially and as applied. We are dealing, then, with four separate programs:

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1. The auxiliary services program, under which public employees of the Intermediate Units furnish to children attending nonpublic schools the same auxiliary services as are furnished to children attending public schools.

2. The textbook loan program, under which the Commonwealth loans to children attending nonpublic schools textbooks for their individual use which are acceptable for use in public schools.

3. The instructional materials loan program, under which the Commonwealth loans to nonpublic schools the same instructional materials as are furnished for public school children. The difference between the textbook loan program and the instructional materials loan program is that the latter covers materials not intended for individual use, either because, in the case of certain audio-visual materials, group use is more appropriate, or because unlike books, the materials are not readily portable, or because equipment is required for their use, or because unlike books they can readily be used by more than one student.

4. The instructional equipment loan program, under which the Commonwealth loans to nonpublic schools instructional equipment which like the instructional materials is not suitable for loan to individual students.

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IV. PLAINTIFFS' CONTENTIONS

Plaintiffs contended, prior to the conclusion of final hearing, that each of the four programs was facially unconstitutional both under the establishment clause and under the free exercise clause, and that each of the programs as applied was unconstitutional under both clauses. After both sides had rested, however, plaintiffs moved to amend the complaint to limit it to an attack on the statutes on their face, so as to eliminate any res adjudicata effect of a judgment insofar as the acts were construed and applied by the Commonwealth defendants. We permitted both sides to file briefs on that motion. We conclude that it would be improper, the case having been fully tried, to permit what would amount to a voluntary dismissal of a major part of it at that stage. *See* Fed. R. Civ.P. 41(a)(2); Fed. R. Civ. P. 15(a). Thus we must dispose of plaintiffs' contentions both of facial unconstitutionality and of unconstitutionality as applied, and both of violation of the establishment clause, Count I, and of interference with plaintiffs' free exercise of religion, Count II.

V. STANDING ISSUES

The defendants challenge the standing, both of the individual and of the organizational plaintiffs. The individual plaintiffs are taxpayers of the Commonwealth. As such they have standing to challenge a Commonwealth expenditure of funds which they contend is prohibited by the establishment clause. *Flast v. Cohen*, 392 U.S. 83 (1968). The organizational plaintiffs all have members who

are taxpayers of the Commonwealth. Though their standing is not as clear as that of the individual plaintiffs, we conclude that they have standing, by virtue of their members' status as taxpayers, to challenge a Commonwealth expenditure of funds which they contend is prohibited by the establishment clause. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727 (1972); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). Thus both the individual plaintiffs and the organizational plaintiffs have standing to proceed with the first count.

The factual allegation upon which the second count is predicated is in paragraph 9 of the complaint:

> "9. It is against the religious conscience of each of the plaintiffs to be forced by the operation of the taxing power to contribute to the propagation of religion in general and to religions to which he does not adhere in particular, or for the support or maintenance of sectarian schools or places of worship.

The court then alleges:

> "12. . . .Each of the Acts on its face and as construed and applied by the defendants, violates the First Amendment to the United States Constitution in that it prohibits the free exercise of religion on the part of the plaintiffs by reason of the fact that it constitutes compulsory taxation for the support of religion or religious schools."

The relief requested is not against collection of the tax, but against the expenditure of funds. Compare this with *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). There is no allegation as to the effect on conscience of members of any of the organization plaintiffs, none of which claims to be of a religious character. The allegations of paragraph 9, quoted above, can refer only to individuals, since only they, and not the organizations, have consciences and exercise religions. Thus we conclude that the complaint does not allege facts which would permit the organizational plaintiffs to assert a free exercise claim. As to the individuals, the issue of their standing to assert a free exercise claim is intertwined with the merits of the second count, and will be discussed when we reach the disposition of that count.

VI. THE ESTABLISHMENT COUNT

A. *The Governing Standards*

The cumulative criteria developed by the Supreme Court for judging state expenditure for education against the prohibition of the establishment clause are clear in expression if not in operation.

> "First, the statute must have secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.' *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)."

The plaintiffs acknowledge that the Pennsylvania legislature had a legitimate secular purpose in enacting both Act 194 and Act 195.[1] The first criteria is not an

1. The legislative findings are as follows:

> "The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth, auxiliary services free of charge to children attending public schools within the Commonwealth. Approximately one quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this act, attend nonpublic schools. Although their parents are taxpayers of the Commonwealth, these children do not receive auxiliary services from the Commonwealth. It is the intent of the General Assembly by this enactment to assure the providing of such auxiliary services in such a manner that every school child in the Commonwealth will equitably share in the benefits thereof. Act 194, Section 1(a), Pa. Stat. tit. 24, Section 9-972(a).
>
> The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth, textbooks and instructional materials free of charge to children attending public schools within the Commonwealth. Approximately one quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this act, attend nonpublic schools. Although their parents are taxpayers of the Commonwealth,
>
> (Cont'd)

issue as to any of the four programs. Thus we turn to a separate consideration of each program under the two remaining criteria, primary effect and undue entanglement.

Since the Court began in *Board of Education v. Allen*, 392 U.S. 236 (1968), to refine what became its cumulative tripartite test it has held statutes authorizing expenditures for education unconstitutional on the primary effect ground in *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973), in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and in *Sloan v. Lemon*, 413 U.S. 825 (1973). It found no primary effect defect in the statutes involved in *Board of Education v. Allen*, *supra*, and in *Hunt v. McNair*, 413 U.S. 734 (1973). *Cf. Walz v. Tax Commission*, 397 U.S. 664 (1970), involving an exemption from taxation. In *Tilton v. Richardson*, 403 U.S. 672 (1971), it sustained a federal statute after excising a minor feature found to involve an impermissible primary effect. The Court did not reach the primary effect issue in *Lemon v. Kurtzman*, *supra*. What amounts to an impermissible primary effect must, therefore, be gleaned by contrasting *Levitt v. Committee for Public Education & Religious Liberty*, *Committee for Public Education & Religious Liberty v. Nyquist*, and *Sloan v. Lemon* on the one side,

(Cont'd)

> these children do not receive textbooks or instructional materials from the Commonwealth. It is the intent of the General Assembly by this enactment to assure such a distribution of such educational aids that every school child in the Commonwealth will equitably share in the benefits thereof. Act 195, Section 1(a), Pa. Stat. tit. 24, Section 9-972(a)."

with *Board of Education v. Allen*, *Walz v. Tax Commission*, *Tilton v. Richardson* and *Hunt v. McNair*, on the other.

Three New York programs were invalidated in *Nyquist*, the "maintenance and repair" provision, the tuition reimbursement provision, and the tax credit provisions. The "maintenance and repair" statute authorized grants totaling $30 to $40 per pupil directly to sectarian schools with no effective restriction on the use to which the maintenance and repair funds could be put. The Court held that the "effect [of these grants], inevitably, is to subsidize and advance the religious mission of sectarian schools." 413 U.S. at 779-780. The tuition reimbursement program provided unrestricted grants to parents to reimburse them for tuition paid at sectarian schools. The Court observed that such grants could not have been given directly to the sectarian schools in the absence of restrictions which would guarantee separation between the secular and the religious functions of the schools. It held that the unrestricted reimbursement of tuition had "the effect of providing direct aid to sectarian schools by providing a direct incentive to parents to send children to such schools. As to the tax credits, it held these to be practically similar to the tuition reimbursement program. This direct incentive, too, was found to be insufficiently restricted to secular purposes. The Pennsylvania tuition reimbursement program invalidated in *Sloan v. Lemon* was found to be indistinguishable from the New York program invalidated in *Nyquist*. Justice Powell wrote in *Sloan v. Lemon:*

> "The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. 413 U.S. at 832."

Levitt involved a New York statute providing for direct payments to private schools for expenses incurred in examination and inspection in connection with testing, maintenance of enrollment records, maintenance of pupil health records, and recording of personnel qualifications and characteristics. The payments were calculated on a per pupil basis. As with the maintenance and repair funds considered in *Nyquist*, there was no effective restriction as to the use to which the funds could be put, no duty to account for or refund sums not expended for state mandated secular purposes, and no differentiation between tests including religious content and tests which were purely secular. The Court held that "the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities," and that therefore the statute had the impermissible primary effect of aiding religions. 413 U.S. at 480. From these cases we conclude that state expenditures will be held to violate the primary effect aspect of the tripartite standard if

> 1. the payment is made directly to a sectarian school and is not effectively restricted to use by that school for secular nonreligious purposes, or

2. the payment is made directly to parents as a reimbursement for expenses incurred in sending children to a sectarian school and the payment is not effectively restricted to reimbursement for expenses for identifiable secular nonsectarian pupil activities or needs.

Board of Education v. Allen, supra, upheld against a primary effect challenge New York's textbook loan statute. That case relied heavily on *Everson v. Board of Education*, 330 U.S. 1 (1947), which had upheld New Jersey's statute providing for reimbursement to parents of expenses incurred in busing children to sectarian schools. *Tilton v. Richardson, supra*, upheld against a primary effect challenge the Federal Higher Education Facilities Act of 1963, 20 U.S.C. Sections 711-58, which authorizes direct grants to institutions of higher education for academic facilities. The Act permits grants to sectarian institutions, but only for facilities that will be used for defined secular purposes. It expressly prohibits the use of the facilities for religious instruction, training, or worship. The Court held invalid, however, a section of the statute which imposed a twenty-year limitation on the federal government's remedy of recapture of a facility's present value if this prohibition is violated. *Hunt v. McNair, supra*, upheld against a primary effect challenge the validity of the South Carolina Educational Facilities Act, S.C. Code Ann. Sections 22-41 *et seq.* (Cum. Supp. 1971) which permitted secular institutions to finance the construction of buildings and facilities from the proceeds of revenue bonds issued by a State authority. As with the federal act upheld in *Tilton v. Richardson, supra*, the revenue bond

device could not be used for facilities used for sectarian instruction or religious worship. The agreements between the State authority and the institution all contained inspection and reconveyance provisions to enforce the prohibition. From these cases we conclude that state expenditures for education will be held not to have the primary effect of advancing religion

1. if, although the payment is made directly to a parent, it reimburses the parent for an expense of a pupil activity clearly identifiable as secular or nonreligious, or

2. if, although a property or service is furnished directly to a student, it is clearly identifiable as a secular or nonreligious property or service, or

3. if, although a payment or service is furnished directly to a secular institution its use is effectively restricted to the secular nonreligious activities of the institution.

The excessive entanglement refinement first appeared in *Walz v. Tax Commission, supra*, as a justification for the obvious benefit conferred upon religious institutions exempted by New York law from property taxation. Chief Justice Burger wrote:

> "The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving

> rise to tax valuation of church property, tax liens tax foreclosures, and other direct confrontations and conflicts that follow in the train of these legal processes. 397 U.S. at 674."

What started in *Waltz* as a justification for exemption from taxation, however, became in *Lemon v. Kurtzman, supra*, the third criterion of the Court's tripartite limitation upon expenditures. Statutes authorizing educational expenditures were held to be unconstitutional on the ground of excessive entanglement in that case, which involved Rhode Island and Pennsylvania enactments. Challenges to educational expenditure statutes on entanglement grounds were rejected in *Tilton v. Richardson, supra*, and *Hunt v. McNair, supra. Board of Education v. Allen, supra*, was decided before the excessive entanglement criterion became explicit, but the *Allen* Court implicitly rejected an attack on that ground. *See, e.g.*, 392 U.S. at 245. What amounts to an impermissible entanglement of government in religion must, therefore, be gleaned by contrasting *Lemon v. Kurtzman* on the one side, with *Board of Education v. Allen, Tilton v. Richardson* and *Hunt v. McNair*, on the other. [2]

2. Neither *Committee for Public Education & Religious Liberty v. Nyquist, supra, Levitt v. Committee for Public Education & Religious Liberty, supra*, nor *Sloan v. Lemon, supra*, were decided on entanglement grounds. In *Nyquist*, however, the opinion of the Court, citing *Lemon v. Kurtzman*, 403 U.S. at 625, did refer to the need for recurring appropriations as a source of potential divisiveness and a possible warning signal. 413 U.S. at 796. *See* discussion at page 45-47, *infra*.

Significantly, in no educational expenditure case decided on entanglement grounds has the Court ruled that the statute in question was facially unconstitutional. In the case of the Rhode Island statute there was an extensive evidentiary hearing which resulted in extensive findings by the district court on the potential for excessive entanglement from comprehensive, extensive and continuing state surveillance. *See* 403 U.S. at 615. In the case of the Pennsylvania statute the Court had before it a complaint which had been dismissed for failure to state a claim for relief. The allegations of the complaint described a statute and a religious school system similar to that of Rhode Island. The dismissal was reversed and the case remanded for further proceedings. [3] In *Tilton v. Richardson, supra*, the appeal arose after an evidentiary hearing in which a three-judge district court made findings respecting the relationship between the religious institutions and the government. The Court looked at the record facts and concluded that considering the nature of the institutions, the nonideological character of the aid, the minimal surveillance required for enforcement of the prohibition against use of facilities for religious purposes, and the noninvolvement of the government in the day-to-day financial decisions of the institutions, no excessive involvement could be found. *Hunt v. McNair* also involved a case in which a record had been developed in

3. Summary judgment was granted in favor of plaintiffs restraining payments under the Pennsylvania statute for services performed or costs incurred after the Supreme Court's decision. *See Lemon v. Kurtzman*, 348 F. Supp. 300, 301 n. 1 (E.D.Pa. 1972) (3-judge court). Payments for predecision services and costs were permitted. *Id., aff'd*, 411 U.S. 192 (1973).

the trial court. Looking at that record the Court reached the same conclusion as in *Tilton v. Richardson.* In *Board of Education v. Allen*, the Court said:

> "We are unable to hold, based solely on judicial notice, that this statute results in unconstitutional involvement of the State . . . 392 U.S. at 248."

From these cases it seems clear to us that a decision on the entanglement criterion will in most if not all cases require a factual inquiry rather than a resort to examination of the face of the statutory issue or to judicial notice about how it may be expected to operate. And as the Court makes clear in *Hunt v. McNair*, the burden of establishing the facts rests with the plaintiff challenging the expenditure.

The Rhode Island and Pennsylvania statutes considered in *Lemon v. Kurtzman*, *supra*, both involved payments either directly to religious schools or directly to teachers employed in such schools for teaching secular subjects. In the Rhode Island case it was found, and in the Pennsylvania case alleged, that the teaching salary supplements would be paid to teachers in schools in which an effort was made to create a pervasive religious atmosphere. The teachers were found, or alleged to be, under religious control or discipline. Religious hierarchical authority was found or alleged to pervade the school system. As Chief Justice Burger wrote with respect to Rhode Island:

> "The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system

> dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. Inevitably some of the teacher's responsibilities hover on the border between secular and religious orientation. 403 U.S. at 618."

Because of these findings (Rhode Island) or allegations (Pennsylvania) about the nature of the schools and the character of the teachers, the direct subsidies for teacher salaries involved in *Lemon v. Kurtzman* presented for the states an acute problem in assuring that only secular and not religious instruction and activities was being supported. As Chief Justice Burger observed:

> "A comprehensive, discriminating and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church. *Id.* at 619."

He also observed that the financial limitations of the Rhode Island program required that the state examine the school's records to determine how much of its total expenditures is attributable to secular education and how much to religious activity. He wrote:

> "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. *Id.* at 620."

Contrasting *Lemon v. Kurtzman* with *Board of Education v. Allen*,, *Tilton v. Richardson* and *Hunt v. McNair*, we conclude that a statute authorizing expenditures for education will be held to involve undue entanglement between government and religion if (a) it authorizes the payment of money or the furnishing of materials or facilities to a religious institution, and (b) the purpose of the payment or the nature of the materials or the facilities, and the character of the institution, are such that the government, in order to assure only secular use of the payment, materials or facilities, will be required to be involved in the internal operations of the institution, both religious and secular, on a continuing basis. But a statute authorizing expenditure for education will not be held to involve undue entanglement between government and religion even though it authorizes the payment of money or the furnishing of materials, equipment or facilities to a religious institution, if the expenditure is limited to secular uses and if from the character of the institution, the purpose of the payment and the nature of the materials or facilities, we find that it will not be necessary, in order to assure only secular use, for government to be involved in the internal operations of the institution secular and religious, on a continuing basis. Application of the entanglement criterion, in short, requires a discreet analysis of each program to determine to what extent intrusion and surveillance will be required.

Justice Powell in *Nyquist* referred to "the Scylla and Charybdis of 'effect' and 'entanglement' ". 413 U.S. at 788. The Straits of Messina does, however, provide a channel for the careful seaman. We do not assume that the Court has made the arms of its primary effect test so long or the currents of its entanglement whirlpool so wide that it has forever frozen the permissible forms of governmental educational expenditure. The plaintiffs' position as to facial unconstitutionality of each of the four programs depends upon an opposite conclusion.

One additional factor must be taken into account. That factor is the constitutional status of the relationship between the Commonwealth, children, and parents. It is clear that the Commonwealth has an interest in the health and education of children that in many respects is superior to the interests of parents or the wishes of children. The compulsory school attendance law, Pa. Stat. tit. 24, Section 13-1327, is a manifestation of that interest. So, too, are laws requiring medical and dental examinations and other mandatory health programs. *E.G.*, Pa. Stat. tit. 24, Sections 14-1401 to 14-1422; *see* Law of March 10, 1949, P.L. 30, art. XII, Section 1303 (repealed 1972) (smallpox vaccination). At the same time some liberty to choose in the matter of education has been recognized as constitutionally protected. *E.G.*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Whether that liberty is a corollary of the free exercise clause of the first amendment or is one of the rights retained by the people to which the ninth amendment refers, or is one of those rights deemed fundamental but not the subject of an express guarantee, is of little moment. If the personal liberty of choice in

education is constitutionally protected, the state must show a compelling state interest for restricting it, and the restriction may go no further in restricting it than is required for the protection of that interest. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); *cf., Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). Thus in legislating upon the education of children the state's choice of means for the achievement of its educational objectives is not restricted only by the establishment clause, and a court considering a constitutional challenge to a state's program must be mindful that the balance struck may be one as to which the alternatives for the achievement of those objectives are limited.

B. Application of Standards

1. The Auxiliary Services Program

The Pennsylvania Department of Education has issued guidelines for the implementation of Act 194. From these guidelines (Exhibit P-1) and from the testimony of witnesses a clear picture of the operation of the act emerges. The Intermediate Units have been designated as the responsible agencies for providing services and assignment of staff for such services to nonpublic school children within the geographic boundaries of the respective Units. The program of any Intermediate Unit for providing auxiliary services is subject to periodic evaluation by the Department of Education. The services provided must

conform to the School Laws of Pennsylvania, the Regulations of the State Board of Education and procedures of the Department of Education. The staff providing the services is employed by the Intermediate Units. Provision of services is defined as " . . .the delivery of auxiliary services requested by nonpublic school representatives to children, through the providing of qualified personnel (whether through the use of staff members of the Intermediate Unit, or through the Intermediate Unit's contracting with other public agencies or individuals), and through the supplying of supportive materials, equipment, and personnel, necessary to the proper rendering of such services." (Exhibit P-1, Section 1.3). The auxiliary services listed in Act 194 are defined in the guidelines as follows:

"1.5 *Guidance, counseling, and testing* means (but is not limited to) such services as are delineated in Title 22, Pennsylvania Code, Section 7.13.

1.6 *Psychological services* shall mean those diagnostic and evaluative services for children, consultation and counseling with students, parents and members of the professional staff relative to understanding the dynamics existent in a student, class, or school.

1.7 *Exceptional children* shall mean 'children of school age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special

education facilities or services.' (Section 1371, School Laws of Pennsylvania)

1.8 *Services for exceptional children* means such educational and other services for exceptional children which are generally recognized to be of particular benefit to exceptional children enrolled in nonpublic schools.

1.9 *Remedial and therapeutic services* shall mean those corrective services applied following identification, including, but not limited to medical, psychological, and psychiatric as well as remedial measures.

1.10 *Speech and hearing services* shall mean those services provided to children whose speech or hearing deviates from accepted standards of their individual social and cultural community in such a way as to interfere with the communication process.

1.11 *Services for the improvement of the educationally disadvantaged* shall include but are not limited to those services necessary to assist a student to perform at the grade level for his age and potential."

Each of these services is rendered not as a part of the nonpublic school's general instructional program, but on an individualized basis to specific children determined to be in need of educational services beyond that available in

a general instructional program. Nor is the program open ended. As both the statute and the guidelines make clear, only such auxiliary services are available as are provided for public school children.

The Commonwealth's interest in providing such individualized auxiliary services to children attending nonpublic schools is strikingly illustrated by the evidence with respect to speech and hearing services. Since 1949 the Commonwealth has required that every child of school age be given, at specified intervals, a hearing test by a school nurse or medical technician. Pa. Stat. tit. 24, Section 14-1402(a)(2); *see* Law of March 10, 1949, P.L. 30, art. XIV, Section 1422. A summary of the audiometric testing program in the School District of Philadelphia in the school year 1967-68 (Exhibit D-19) discloses:

	Pupils Tested	Pupils Failed	%	Unable to Test	%
Public	108,139	5,319	4.7	164	0.2
Parochial	68,448	3,561	5.2	49	0.8
Private	2,356	107	4.2	10	0.4
Martin School	221	213	96.4	8	3.6
Archbishop Ryan Memorial Institute	66	54	81.8	12	18.2

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There is no reason to believe that these results would be untypical of other Intermediate Units. P.D. Stopper, a speech therapist employed by the Carbon-Lehigh Intermediate Unit to render speech therapy services pursuant to Act 194 testified as follows:

> "Q. Very well. As a professional speech therapist, is it your observation that there are many children who have speech problems? A. I think with that question I should answer it giving you what our professional journals say. The American Speech and Hearing Association publishes a journal or several of them and in that they have indicated that there are between five and up to ten per cent of the public school population that have speech problems. The reason I emphasize 'public school' is because that's where the research was done.
>
> Now, when I took this job, out of simple professional interest, I decided to find out what types or what percentages my schools had in relation to what my profession says there should be. In some schools I found it rather high. There was one up to 19 per cent which I thought was extreme. There was one around 15. There were several around 11 per cent. The average was above what the American Speech and Hearing Association said there should be, and I thought that was an interest of the profession.

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Q. What schools are they, public or non-public, to which you are referring now? A. I work in the non-public schools.

Q. Now, therefore, you find that there are children who need speech therapy in both public and non-public schools? A. That is correct. I do find, though, that there is a greater need in the non-public schools, and the reason I say that is because it is almost like a frontier. There have not been services — well, there have — let's say there have been services, but they haven't been adequate in any way.

For instance, out of the children that I have seen screened in my schools, I have located approximately 350 children that could use speech therapy, but when I went into those schools, the only children that had been receiving speech therapy was the No. 17. There were 17 that were being taken from the parochial school into the public school to get their speech therapy.

Q. To what do you attribute this lack of service, to what do you attribute the fact that only 17 had had the speech therapy? A. I have read what was published by my Intermediate Unit as the guidelines for accepting children from a parochial or non-public school into a public school speech program. That guideline said that it was up to the speech therapist's time and discretion whether to accept the children in their programs or not.

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One of the problems there was, I think it was mentioned by the psychologist, transportation for one, but discretion of the speech therapist was also important, I found.

Q. What do you mean by 'the discretion of the speech therapist'? A. Well, if she could fit it into her case load, that was the major one, if she could fit it in, and if she already had a full case load, many times the children were refused.

Q. Was it your observation that she did or did not often have a full case load of public school children? A. I would say many times that she had a full one, but I would also say that there was one that I know of specifically who came in. She was a public school therapist. And she came in a half hour earlier to take some children from a parochial school. So it depended on the therapist (Tr. 35-37)."

Dr. D. A. Horowitz, Associate Superintendent for Schools For Special Services of the Philadelphia School District,[4] testified with respect to auxiliary services:

> "Q. Are these auxiliary services under Act 194 part of the ordinary regular school curriculum or program? A. In the public or non-public schools, sir?

4. Philadelphia is both a school district and an Intermediate Unit.

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Q. Well, in the non-public school? A. Are they? Generally not, to my best knowledge. They have existed in a rather spotty way and I say this only from second-hand information. (Tr. 45-46).

* * *

Q. Now, Mr. Horowitz, in your professional opinion, focusing now on services under Act 194, in your opinion, can such services be afforded non-public school children at public centers? A. At public schools?

Q. Yes. A. No, I don't think so.

Q. Why is that? A. Well, for many reasons, and depending on the specific, you know, item to which you are referring, where this equipment is being used, it is being fully utilized and cannot carry additional service or service time given to additional pupils who might come in plus the logistical problems of bringing in children or groups of children for a specific piece of an instructional program at a given time of the day and given weeks of the year. Logistically it just isn't possible. (Tr. 49)."

Thus, taking hearing problems as an example, the Commonwealth was confronted with the reality that a very substantial number of nonpublic school children were suffering from untreated hearing deficiencies; deficiencies which are critical impediments to the entire learning process. The logistical problems of providing the services at

public centers were at least formidable, if not insurmountable. The legislature chose to meet the problem by sending the therapists to the pupils. The same rea'ity applied to the other learning auxiliary services listed in Act 194.

We hold that none of the specific auxiliary services listed in Act 194 has the primary effect of aiding religion. Each has the primary effect of meeting the state's primary objective of assuring that individual students receive those individualized services, outside the general program of instruction of their school, necessary for their individual progress in learning. It is true, of course, that a child with vision defects, provided glasses, will be enabled to read the Bible, as a child with hearing defects, provided a hearing aid, will be enabled to hear the word of God, and as an emotionally disturbed child, given psychological or medical therapy, may become receptive to religious training. But the benefit to religion in such instances is clearly secondary, and such secondary benefit exists no less for children attending public than for children attending nonpublic schools.

Plaintiffs focus, however, not so much on the specific auxiliary services listed in Act 194, but on the phrase " . . .such other secular, neutral, non-ideological services as are of benefit to non-public school children and are presently or hereafter provided for public school children of the Commonwealth." This phrase, they suggest, makes the act so open ended that it will permit the Commonwealth to furnish teachers for the general instructional programs of the nonpublic schools. This, they

urge, is prohibited by *Lemon v. Kurtzman, supra. Lemon v. Kurtzman* did not deal with public employees. But we need not here decide if that difference is criticial.We do not believe Act 194 is subject to the open-ended construction plaintiffs suggest. First, it was not written in a vacuum. The Intermediate Units were already providing auxiliary services to public schools, and these did not include furnishing teachers for the general instructional programs of the school districts. Second, the guidelines issued by the Pennsylvania Department of Education (Exhibit P-1) disclose no intention to apply Act 194 in an open-ended manner. The guidelines suggest, rather, an *ejusdem generis* construction. Third, the plaintiffs have produced no evidence from which we could infer any likelihood of the open-ended construction they suggest.

We note that John Jarvis, headmaster of Lancaster County Day School, a private nonsectarian school, testified:

> "Q. And I show you this pamphlet marked D-24 which I have already identified. Would you hold that up to the members of the court and explain what that is and what services are available to you now that were not heretofore which were also available to the public schools in your area?
> A. Well, this has just been an opening up of certain opportunities for us that we really have not had before. There are a series of very excellent workshops being planned by Lancaster-Lebanon Intermediate Unit in which we are invited to participate. Not only are we invited, but secondly,

> we now would be able to apply under Act 194 for funds to cover the expenses of these workshops (Tr. 85)."

It is not at all clear that Act 194 authorizes auxiliary services to teachers in the nature of continuing professional education. The guidelines of the Pennsylvania Department of Education do not mention programs for teachers. It is clear that Intermediate Units are authorized by another statute to provide such services to teachers in public schools. Pa. Stat. tit. 24, Section 9-964. If Mr. Jarvis is correct that nonpublic school teachers will by virtue of Act 194 be admitted to the continuing professional education programs conducted by the Intermediate Units, we see no primary effect difficulty. The content of the programs obviously will be secular since they are entirely within the control of the Intermediate Units. Assistance to the religious mission of the sectarian schools is at least as remote and secondary in effect as when the Commonwealth permits potential teachers in such schools to attend its Commonwealth-supported Universities.

Plaintiffs urge that Act 194 fails the entanglement test because it provides "...such auxiliary services to be provided in their respective schools." The act does require contact between personnel of the Intermediate Units and personnel of sectarian schools. The Commonwealth, recognizing the logistical realities, provided for traveling therapists rather than traveling pupils. There is no evidence whatsoever that the presence of the therapists in the schools will involve them in the religious missions of the schools. The degree of interference by the Commonwealth

in the general instructional mission of the religious schools would be greater, not less, if instead of sending therapists to the schools it required that pupils needing auxiliary services be dismissed from school and transported to public centers. The degree of contact between the religious teachers and the personnel of the Intermediate Units would be approximately the same. Unlike the programs considered in *Lemon v. Kurtzman*, *supra*, no continuing audit of the nonpublic schools' general instructional program or of their finances is necessary to insure that the services provided remain secular and nonideological. The notion that by setting foot inside a sectarian school a professional therapist or counselor will succumb to sectarianization of his or her professional work is not supported by any evidence. Pennsylvania has for many years sent public health nurses into nonpublic schools to carry out its mandatory student health program. Pa. Stat. tit. 24, Section 14-1402. We are sure that if the professionals in this program had become tainted by religion, evidence of the taint would have been produced. The Intermediate Units will exercise the same controls over its professional employees serving nonpublic school children as they exercise over public school employees generally. This is not a case of potential interference with the general instructional program of a religious institution.

If Act 194 permits teachers from sectarian schools to attend continuing education workshops conducted by the Intermediate Units, we find no entanglement danger. The Intermediate Units may not conduct programs of instruction in religion. If admitted, religious teachers may attend or not, but their attendance will involve no actual

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or potential interference by the Commonwealth with the instructional program or the financing of religious institutions.

We find that Act 194, both facially and as thus far applied (1) does not have the primary effect of advancing religion, and (2) does not involve the Commonwealth in an impermissible entanglement with religion.

2. The Textbook Loan Program.

The textbook loan provisions of Act 195 are for first amendment purposes indistinguishable from the 1965 New York textbook loan statute upheld in *Board of Education v. Allen*, *supra*. Since 1885 Pennsylvania children attending public schools have been furnished textbooks for use in those schools free of cost. Law of June 25, 1885, P.L. 173, Section 1 (now Pa. Stat. tit. 24, Section 8-801). The textbook loan provisions of Act 195 confer the same benefit on children attending nonpublic schools at which they can comply with the compulsory attendance law. The loan of textbooks under each statute is upon individual request. The textbooks, under each statute, must be books antecedently approved for use in the public schools. Under neither statute may religious texts be obtained, and the decision as to which texts qualify as secular, nonideological and neutral rests with the public authorities. The expenditure is for a clearly identifiable authorities. The expenditure is for a clearly

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identifiable secular purpose. The only contact between the nonpublic schools and the Commonwealth authorities is the minimal contact involved in correspondence over processing the individual student book requests to those authorities, and in maintaining an inventory of the textbooks.[5] This contact in no way involves the Commonwealth with the religious mission of a school, with the content of its general program of instruction, or with its finances. The textbook loan program is controlled by *Board of Education v. Allen*, *supra*, and *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930). We find that the textbook loan provisions of Act 195 both facially and as thus far applied (1) do not have the primary effect of advancing religion, and (2) do not involve the Commonwealth in an impermissible entanglement with religion.

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5. The guidelines of the Pennsylvania Department of Education (Exhibit P-1) provide:

Inventory

4:10 'Textbooks' loaned to the nonpublic schools:

a. Shall be maintained on an inventory by the nonpublic school.

b. and purchased by the Department of Education under Act 195 of 1972 shall be maintained on a statewide inventory by the Division of School Libraries.

4.11 It is presumed that textbooks on loan to nonpublic schools after a period of time will be lost, missing, obsolete or worn out. This information should be communicated to the Department of Education. After a period of six years, textbooks shall be declared unservicable and the disposal of such shall be at the discretion of the Secretary of Education.

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3. The Instructional Materials Loan Program

The instructional materials loan program of Act 195 differs from the textbook loan program (1) in the nature of the materials loaned, and (2) in the recipient of the loan. The guidelines of the Pennsylvania Department of Education provide:

"*General Provisions*

3.1 Intermediate units are hereby designated as the responsible agencies for providing instructional materials . . .to children in the nonpublic schools within the geographic boundaries of the intermediate units. Each intermediate unit shall comply with the appropriate procedures and regulations of the Department of Education and the appropriate sections of the Public School Code of Pennsylvania of 1949 as amended.

* * *

Program Operation

3.9 The implementation of the Instructional Materials . . .portion of Act 195 of 1972 shall conform to the School Laws of Pennsylvania, Regulations of the State Board of Education, and procedures of the Department of Education.

* * *

3.15 Purchasing of Instructional Materials

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a. Each nonpublic school or the appropriate chief administrator shall submit a loan request on or before October 31 of the initial year and on or before March 15 thereafter for desired 'Instructional Materials' not to exceed 80 per cent of their total allocation for 'Instructional Equipment' and 'Instructional Materials' to the intermediate unit administering the provisions of Act 195.

b. The intermediate unit shall consolidate the loan requests and order the desired 'Instructional Materials' in accordance with the Public School Code of Pennsylvania of 1949 as amended.

c. The intermediate unit shall develop a plan for inventory control.

3.16 Inventory of Instructional . . .Materials

a. Instructional materials loaned to the nonpublic schools shall be maintained on an inventory by both the nonpublic and the appropriate intermediate unit.

b. It is presumed that instructional materials on loan to nonpublic schools after a period of time will be lost, missing, obsolete or worn out. These items should be so noted on an annual inventory.

* * *

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> d. Each nonpublic school shall submit to the local intermediate unit an inventory of all instructional materials . . .on loan on or before June 1 of each fiscal year. Each intermediate unit should submit to the Secretary of Education a composite inventory of all instructional materials . . .on loan, on or before June 30 of each fiscal year."

To distinguish the primary effect of the instructional materials loan provisions from the textbook loan provisions we would be required to attach constitutional significance either to the difference between textbooks and such materials or to the fact that the schools rather than individual students became the bailees. As to the nature of the materials, there are no distinctions of constitutional significance between secular, neutral, nonideological textbooks, on the one hand, and secular, neutral, nonideological "books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, . . .process slides transparencies, films, filmstrips kinescopes, and videotapes" on the other. If the public authorities can be trusted with selecting secular, neutral, nonideological textbooks for use by students in religious schools, they can be trusted to make the same judgment with respect to those instructional materials which in this nonsequential age have to some extent replaced textbooks as teaching media. As with textbooks, this statute is, from the point of view of primary effect, largely self-enforcing since by hypothesis the instructional materials will be the same as are made available in the public schools.

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Nor can we attach constitutional significance to the fact that the schools rather than individual students, become the bailees of the materials. No evidence has been presented from which we may infer that secular, neutral, nonideological instructional materials such as audio-visual materials, intended for group rather than individual use, are any more susceptible of diversion to a religious purpose than are textbooks. The expenditure is for a clearly identifiable secular purpose. The school is the custodian out of practical necessity because such materials are designed for group or multi-student use. *Tilton v. Richardson*, *supra*, and *Hunt v. McNair*, *supra*, teach that the religious institution's possession of the property granted under a school aid statute is not alone significant. No greater entanglement is required by the operation of the instructional materials loan program than by the textbook loan program. We find that the instructional materials loan provisions of Act 195 both facially and as thus far applied (1) do not have the primary effect of advancing religion and (2) do not involve the Commonwealth in an impermissible entanglement with religion.

4. The Instructional Equipment Loan Program

Loans of instructional equipment are authorized by the same subsection of Act 195 as authorizes loans of instructional materials. One obvious purpose of the equipment provision is to make useable that instructional material which for use requires equipment — slide projectors for slides, for example. But other equipment is authorized as well. As with textbooks and instructional

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materials, selection of the equipment is in the hands of Commonwealth authorities. Thus the equipment starts out quite clearly as secular in purpose. But while textbooks and instructional materials self-police, in that starting as secular, nonideological and neutral, they will not change in use, some equipment is not of the self-policing variety.

We can set to one side, and treat like instructional materials, equipment which from its nature is incapable of diversion to a religious purpose — laboratory equipment and gymnasium equipment, for example. Giving free rein to the imagination one could, perhaps, visualize a religious teacher storing holy water in a chemistry laboratory beaker, but as stated in *Tilton v. Richardson, supra*, 403 U.S. at 679:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. But judicial concern about these possibilities cannot, standing alone warrant striking down a statute as unconstitutional.

Other equipment, however, like the buildings in *Tilton v. Richardson, supra*, and *Hunt v. McNair, supra*, is capable of diversion to sectarian purposes. A projector, for example, could be used to show a religious film. To the extent that Act 195 authorizes the loan of equipment capable of such diversion, a primary effect issue arises. We must look, then, at whether the Commonwealth has effectively restricted use of such equipment to secular purposes.

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The guidelines of the Pennsylvania Department of Education (Exhibit P-1) provide:

> 3.14 Purchasing of Instructional Equipment
>
> a. Each nonpublic school or the appropriate chief administrator shall submit a loan request on or before October 31 of the initial year and on or before March 15 thereafter for the desired instructional equipment not to exceed 80 per cent of the total allocation for 'Instructional Materials' and 'Instructional Equipment' to the designated intermediate unit in whose extended service area the nonpublic school is located.
>
> b. The designated intermediate unit shall consolidate the loan requests and order the desired equipment in accordance with those sections of the Public School Code of Pennsylvania of 1949 as amended.
>
> * * *
>
> 3.16 Inventory of Instructional Equipment
>
> c. Instructional equipment loaned to nonpublic schools shall be maintained on an inventory by both nonpublic school and the appropriate intermediate unit. After a period of 10 years these items shall be declared unservicable and the disposal of such shall be at the discretion of the Secretary of Education.

d. Each nonpublic school shall submit to the local intermediate unit an inventory of all instructional . . .equipment on loan on or before June 1 of each fiscal year. Each intermediate unit should submit to the Secretary of Education a composite inventory of all instructional . . . equipment on loan, on or before June 30 of each fiscal year."

In *Tilton v. Richardson*, the statute, 20 U.S.C. Section 751(a)(2), explicitly excluded a grant for any facility to be used for sectarian instruction or as a place for religious worship. The statute here is not quite so explicit. It refers to the equipment as "secular, neutral, non-ideological" and "presently or hereafter provided for public school children of the Commonwealth." But the Commonwealth defendants insist that properly construed and as construed by them, the statute means that "secular, neutral, non-ideological" applies not only to the nature of the equipment but also to its use. In *Tilton v. Richardson*, the statute, 20 U.S.C. Section 754(b)(2), provided that the United States could, if statutory restrictions as to use of the facility were violated "recover an amount equal to the proportion of the facility's present value that the federal grant bore to the original costs". 403 U.S. at 682. The statute here has no explicit provision for repossession of the loaned equipment, and no provision for recovery of its cost, if it is used for a religious purpose. Assuming, as the Commonwealth contends, that the statute properly construed permits recapture of the equipment if it is used for a religious purpose a difficult surveillance problem remains as to which the Commonwealth has shown no simple solution. A slide or movie projector, television and

broadcasting equipment, copying, printing and reproduction equipment may begin as neutral but can easily be adapted to a religious use. The key is predictability. Where, either from the statutory provisions or from the nature of the equipment, there is a means for the public officials to chart a lawful and administratively simple course, the loan may be constitutional. But where the equipment is not from its nature of the self-policing character, the Commonwealth may not, as the intervenors suggest, rely on the good faith of the bailees.

We find, then, that insofar as they permit the loan of instructional equipment which can be easily diverted to a religious use, the equipment loan provisions of Act 195, as applied, either have the primary effect of advancing religion or may involve the Commonwealth in an impermissible entanglement with religion. Insofar as the statute permits the loan of instructional equipment such as gymnasium equipment, laboratory equipment and the like which from its nature cannot be used for any but secular purposes, as applied Act 195 neither has the primary effect of advancing religion nor involves the Commonwealth in an impermissible entanglement with religion. The two categories of equipment are severable.

As a separate ground for their attack upon Acts 194 and 195 under the establishment clause the plaintiffs allege that each act "gives rise to and intensifies political fragmentation and diviseness along religious lines." Complaint, para. 11. The plaintiffs introduced no evidence in support of this allegation. The defendants introduced the deposition of Carmen Bruto, a legislative

correspondent of long experience, which contains his expert opinion that appropriations to carry out Acts 194 and 195 will not significantly involve legislative discussion of religion. We have no occasion to rely on that opinion. If plaintiffs' allegation is treated as one of fact, we hold that it simply has not been proven. Undoubtedly, however, what plaintiffs have in mind is a rule of law that any statute providing aid to nonpublic school children and requiring annual appropriations will be presumed to be politically divisive along religious lines. The potential for divisiveness in statutes providing for aid to nonpublic school children was touched upon in *Lemon v. Kurtzman*, 403 U.S. at 622, and in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. at 797-98, where the Court said:

> "[W]hile the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by decisions of this Court, it is certainly a 'warning signal' not to be ignored."

We have given the statutes the careful scrutiny which the standards announced in the opinions of the Supreme Court require, and they have survived. In making that scrutiny we were aware of the potential for political divisiveness along religious lines from a decision either way on their constitutionality. We are not ready to assume, as the plaintiffs are, that an important social issue will become less divisive because an article III court has spoken upon it. The lessons of history are clearly to the contrary. The Court's pronouncement on school prayer, *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), for example, is still the subject of heated debate. *See, e.g.*,

N.Y. Times, Sept. 25, 1973, Section 1, at 34, cols. 1-2. The divisiveness of the issues decided in *Brown v. Board of Education*, 347 U.S. 483 (1954), has continued unabated since the Court's pronouncement. Those issues continued to boil and fester under *Plessy v. Ferguson*, 163 U.S. 537 (1896), for fifty-eight years until the Court reversed that decision. The nature of the issues involved in the whole area of choice in education are so complex and controversial that no pronouncement by a court will make them somehow go away.

VII. THE FREE EXERCISE COUNT

We held in discussing standing that as this complaint is drafted only the individual plaintiffs have standing to assert an interference with the free exercise of their religion. Of these, only plaintiff Meek testified. It was stipulated that the testimony of Weatherley would be the same. Since the free exercise claim was put in issue by the defendants there is a failure of proof as to all plaintiffs other than Meek and Weatherley. As to them, we find from her testimony that their objection to the Commonwealth's program is essentially political and social rather than religious, and that the impact of whatever miniscule burden of taxation which results to them from the expenditures in question has no effect upon the free exercise of their religion. *See Tilton v. Richardson*, *supra* at 689; *cf. Board of Education v. Allen*, *supra* at 248-49. Since we find that their objection to the programs is essentially political and social rather than religious there is no occasion to pass upon the issue whether a plaintiff has standing to challenge a governmental expenditure on free exercise rather than on establishment grounds. Compare *Wisconsin v. Yoder*, *supra*; *Murdock v. Pennsylvania*, *supra*.

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VIII. CONCLUSION

The plaintiffs' application for a preliminary and a final injunction against the expenditure of Commonwealth funds pursuant to Act 194 will be denied. The plaintiffs' application for a preliminary and final injunction against the expenditure of Commonwealth funds pursuant to Act 195 will be granted to the extent that the Commonwealth defendants will be enjoined from loaning instructional equipment which from its nature can be diverted to religious purposes. The parties shall meet with Judge Bechtle on Friday, February 25, 1974 at 9:30 A.M. in Room 2106, United States Courthouse, Philadelphia, Pennsylvania for a conference at which he will receive suggestions as to the precise provisions of the injunction. If the parties are unable to agree on the form of an injunction, a hearing as to scope of relief will be held before this three-judge court on a prompt date to be fixed.

John J. Gibbons, Circuit Judge

Louis C. Bechtle, District Judge

APPENDIX A
DISSENTING OPINION OF HIGGINBOTHAM

IN THE

UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL and AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,

Plaintiffs,

v.

JOHN C. PITTINGER, as Secretary of Education of the Commonwealth of Pennsylvania and GRACE M. SLOAN, as Treasurer,

Defendants,

JOSE DIAZ and ENILDA DIAZ, his wife, on their own behalf and as guardians of their minor children, Dalila, Jose, Jr., and Sergio Diaz; WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, on their own behalf and as guardians of their minor child, Rochelle Zimmerspitz; THOMAS J. HASSALL and MARIE HASSALL, his wife, on their own behalf and as guardians of their minor child, Patricia Anne; DANIEL F. X. POWELL and ANNA T.

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POWELL, his wife, on their own behalf and as guardians of their minor children, Kathleen A. and Daniel F. X., Jr.; SETH W. WATSON, JR. and ANNE P. WATSON, his wife, on their own behalf and as guardians of their minor child, Ellen P.; JOHN P. CHESICK, on his own behalf and on behalf of his daughter, Emily; MRS. ROBERT BOOZER, on her own behalf and on behalf of her daughter, Debra McKissick and the Springdale School on behalf of its students,

Intervening Parties Defendants.

Before:

John J. Gibbons, Circuit Judge
A. Leon Higginbotham, Jr., District Judge
Louis Charles Bechtle, District Judge

HIGGINBOTHAM, District Judge, concurring in part and dissenting in part.

February 11, 1974

I.

Introduction

Seven decades ago, Mr. Justice Holmes reminded us that:

> "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future,

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> but because of some accident of *immediate overwhelming interest which appeals to the feelings and distorts the judgment.* These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." [Dissenting Opinion in *Northern Securities Company v. United States*, 193 U.S. 197, 400-401, 24 S. Ct. 436, 468 (1904)] (Emphasis added.)

The current financial hardships, the plight and in fact the possible survival of many of Pennsylvania's nonpublic schools make the instant matter both a "great" and a "hard" case. Certainly, there is a tugging appeal to one's humanitarian feelings and interest over the difficulties which will confront nonpublic schools if these appropriations are constitutionally precluded, [1] and one is

1. While the instant record does not contain as original documents much economic data on the precise impact of the termination of the economic assistance in issue to students attending nonpublic schools, counsel for intervenor, Springfield, has included a copy of the brief filed by Henry E. Crouter in Crouter v. Lemon, ___U.S.___, 93 S. Ct. 2982 (1973). In that latter brief, President Nixon is quoted as having said:

> " . . . In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools.
>
> If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed $4 billion per year in operations, with an

(Cont'd)

mindful that, unfortunately, the financial crisis is perhaps most crucial to the Roman Catholic parochial schools which have contributed so much in educating so many at such relatively low cost.[2] I am not unaware of the grave concern that more public funds would have to be spent. If nonpublic schools were closed thereby transferring the educational burden almost totally to the public arena; however, for me the constitutional test is not one of fiscal loan, since the argument on fiscal grounds embraces the

(Cont'd)

> extimated $5 billion more needed for facilities." Report to the Congress of March 3, 1970 on Education Reform. Crouter brief at 59.

Theodore R. Sizer, Dean of the Harvard Graduate School of Education, has said:

> "How to finance this necessary and responsible increased cost? In my judgment the average independent school would not be able to increase its income the requisite amount and still hold tuition down low enough to provide for a varied student body. The only recourse is public funds . . . ." Crouter brief at 56.

2. The Report of the Archdiocesian Advisory Committee on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties (Abridged Edition 1972) notes that in fiscal 1970 elementary schools in the Archdiocese of Philadelphia incurred debts of $193,000 while high schools spent $804,000 more than available revenues.

> "A. . . . The combined school operation deficit for 1970 was, therefore, $997 thousand. Thus, the total deficit for 1970 incurred by the three operations — parish churches, elementary schools and diocesan high schools — was $2.2 million. During fiscal 1971, the deficit in parish operations alone jumped to $5.1 million, a four-fold increase over 1970.

type of interest which in the words of Justice Holmes could appeal to the feelings and distort the constitutional judgment.[3]

(Cont'd)

> Although complete school financial data is not yet available for 1971, there is every probability that the total deficit will increase, due mainly to the elimination of state aid.
>
> B. Deficits will continue and will grow during the next several years. Projections covering the school years 1972-73 (fiscal '73) to 1974-75 (fiscal '75) indicate that by 1975 the cumulative deficit in the schools will reach $55.4 million. That projection represents the deficit resulting from a concatenation of most probable conditions. The deficit could be as high as $84.1 million, or a low of $43.1 million." *Id.* at 9.

3. See as an example Legislative Finding 4 of the Pennsylvania Act under attack in Crouter v. Lemon, ___U.S. ___, 93 S. Ct. 2982 (1973):

> "(4) Should parents of children now enrolled in nonpubilc schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools the five hundred thousand students now enrolled in Pennsylvania nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth."

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But today, just as when the First Amendment was written almost two centuries ago, we must be vigilant to not let the "immediate interest" at hand cause the federal courts to bend or deviate from the well-settled principles of law embraced within the boundries of the Establishment and Free Exercise Clauses of the First Amendment. It is now too late in the day to move backwards the hands of our forefather's constitutional clock.

This, I concur with the majority of the Court today only insofar as they uphold the provisions of Act 195 pertaining to the loaning of secular textbooks to the nonpublic school pupils. Furthermore, I concur with the majority opinion's conclusion that those portions of Act 195 which authorize the loaning of projection equipment and recording equipment must be invalidated, but I respectfully dissent from the Court's conclusion that equipment of that nature can be severed from the overall instructional equipment loan program and otherwise approved. Reiterating my position, I believe only the loaning of secular textbooks can be constitutionally permitted under the First Amendment, and the remaining aid programs, including the auxiliary services program of Act 194, the instructional materials program of Act 195, and the instructional equipment program of Act 195 must be stricken down *in toto* and be held unconstitutional.

In many respects, this case vividly illustrates and typifies the unswerving persistence and perseverance of state legislatures throughout the nation in continually seeking to alleviate the increasing financial plight and monetary strain of nonpublic secondary and elementary

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schools. Each successive legislative scheme, heeding the sage admonitions reflected in the growing number of Supreme Court pronouncements, becomes inevitably more sophisticated and refined as it endeavours to approach as close as feasible to the "verge"[4] of the constitutional precipice and yet not overstep the boundaries of the Establishment and Free Exercise Clauses of the First Amendment. Recognizing that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S. Ct. 2105, 2111 (1971) (Burger, Ch. J.), it is my judgment that, adhering to the constitutional standards and guidelines announced heretofore, the only component of Acts 194 and 195 which substantially complies with the First Amendment strictures is the loaning of secular textbooks to nonpublic school pupils.

The majority of the Court has today adopted a position that in my view exalts form over substance, ignoring and obscuring a fundamental reality that the subsidizing and sponsorship of secular education in nonpublic secondary and elementary schools ineluctably will eventuate in spawning the fostering and promotion of religion violative of the Establishment Clause of the First Amendment. The constitutional guarantees traditionally subsumed under and secured by the Establishment Clause have today unquestionably been seriously if not irreparably eroded and eviscerated. As a likely aftermath

4. The "verge" language was first penned by Justice Black in Everson v. Board of Education of Ewing Tp., 330 U.S. 1, 16, 67 S. Ct. 504, 512 (1947).

of the Court's affixing its imprimatur to this legislation, one can forecast dire portents for Church-State relations. Most assuredly, this action will not go unnoticed in other states whose steadfast hopes of being able to financially assist nonpublic schools have still not been dashed and who remain undaunted and confident that they ultimately will prevail.

I recognize that my most able and distinguished colleagues speak with equal sincerity and conviction for the views which they diligently used in the majority opinion. Yet, with all due respect and esteem I feel that I would be utterly remiss (from my perspective of the constitution) if I did not register my firmest protest against what I regard as a perilous departure from the teachings of the First Amendment. The instant decision is not merely a latent, minute crack in the constitutional bulwark, instead it smashes the constitutional floodgates. It sanctions the potential inundation of ominous policies which could leave the constitution a mere shell of what the Founding Fathers envisioned and it creates dangers which the founders so fervently and zealously sought to avoid.[4a]

4a. For a history of the First Amendment and its constraints, see Everson v. Board of Education of Ewing Tp. 330 U.S. 1, 28-63, 67 S. Ct. 504, 517-535 (1947) (Rutledge, J., Dissenting) and the references cited therein; Memorial and Remonstrance Against Religious Assessments, II Writings of James Madison 183-191 (Hunt ed. 1901); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 212-232, 68 S. Ct. 461, 466-475 (1948) (Frankfurter, J., concurring). See also Notes — Sectarian Books, the Supreme Court and the Establishment Clause, 79 Yale L.J. 111, 131-139 (1969); Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680 (1969); Pfeffer, *Church, State, and Freedom* (rev. ed. 1967). For general historical references see Emerson, Haber & Dorsen, *Political and Civil Rights in the United States*, Vol. 1 at 743-744 (1967).

The First Amendment as it assures freedom of religion and prohibits governmental establishment of religion, comes almost directly and primarily from the authorship of James Madison and his prior efforts in writing A Bill For Establishing Religious Freedom as finally enacted by the General Assembly of Virginia on January 19, 1786. In pointed language that provision noted:

> "Well aware that Almighty God hath created the mind free; . . . *that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical;*
>
> "We, the General Assembly, do enact, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief." (Emphasis added.)

We have clearly turned the constitutional clock backwards here. Madison, as author of the First Amendment, was concerned that not even a "three pence" contribution be exacted from any citizen in the aid or establishment of a religion. (See third paragraph of Memorial and Remonstrance Against Religious Assessments). Here the majority sanctions almost seventy million dollars exacted from taxpayers in one state. Tragically, there is no suggestion that the end to this escalating magnitude is ever in sight if sophisticated nomenclature and adroit bookkeeping mechanisms are used.

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II.

Relevant Financial and Religious Characteristics of Acts 194 and 195

Before focusing on the constitutional questions the financial dimensions of this legislation should be highlighted, particularly noting and emphasizing the sectarian and denominational affiliations of most of the recipients of these governmental subsidies. In administering Acts 194 and 195 the Commonwealth has adopted the position that it will *not* inquire about the religious characteristics of the nonpublic schools requesting monies provided in accordance with this legislation. The only criterion apparently imposed in determining eligibility is that the nonpublic school complies with and fulfills the Commonwealth's compulsory school attendance requirements. Thus even if a nonpublic school maintains religious restrictions on pupil admissions, that school would not be precluded from participating in the programs challenged here. Along the same lines, Robert J. Czekoski, Coordinator of Nonpublic School Services and the chief administrator of Acts 194 and 195, testified at the final hearing on plaintiffs' application for a preliminary injunction that it was of no relevance in implementing the programs and thus the Commonwealth would not inquire whether any school compelled attendance for instruction in theology and religious doctrine or required participation in religious worship. Nor would the Commonwealth question if the nonpublic school was an integral part of the religious mission of the sponsoring church, has as a substantial or

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dominant purpose the inculcation of religious values, imposes religious restrictions on faculty appointments, or attaches religious restrictions on what the faculty might teach. (See generally N.T. of September 10, 1973 at 8-18, particularly 13-17.)

In answers to interrogatories propounded by the plaintiffs it was ascertained that of the 1,320 nonpublic schools in the Commonwealth which comply with the compulsory attendance laws, at least 986 or roughly 75 per cent were Roman Catholic Diocesan schools. To further clarify those statistics, the aggregate number of individuals attending nonpublic schools was 453,699, but 400, 932 or approximately 88 per cent represented pupils attending Roman Catholic Diocesan schools. The record does not provide a more specific religious delineation for the remaining nonpublic schools.[5]

For the 1972-1973 school year the Commonwealth budgeted $14,280,000 for the implementation of Act 194

5. Significantly, one should bear in mind that the predominant concentration of Catholic schools which will receive aid under these Acts does not fully account for or document the degree of participation or involvement of other sectarian, e.g., Lutheran, Jewish, Presbyterian, or Episcopalian schools. Thus if the entire statistical universe of all sectarian schools in the Commonwealth were included, it necessarily would reflect a higher percentage of the nonpublic schools being religiously identified or integrally connected with sectarian organizations. *Cf.* Sloan v. Lemon, ___U.S. ___, 93 U.S. Ct. 2982, 2985-2986 (1973) and Lemon v. Kurtzman, 403 U.S. 602, 610, 91 S. Ct. 2105, 2110 (1971), where the Court found that more than 96 per cent of the nonpublic schools in the Commonwealth were church-related.

and $16,660,000 for Act 195. The respective figures appropriated for the 1973-1974 school term are $17,880,000 and $17,560,000. Under Act 195, during the 1972-1973 school year $4,670,000 of the sum budgeted for that year had been expended for the acquisition of textbooks for loan to nonpublic school children.

At least two observations can be readily gleaned from the foregoing statistics. First, the sums allocated by the Commonwealth for the implementation of Acts 194 and 195 can by no means be regarded as insubstantial or insignificant. Secondly, nonpublic schools having a recognized and dominant sectarian character are the primary and principal beneficiaries of the legislative enactments. The presence of the latter feature has notably contributed to several courts ruling that statutes of this nature were essentially class legislation and thus constitutionally suspect under the First Amendment. See, *e.g.*, *Sloan v. Lemon*, ___ , U.S. ___ , 93 S. Ct. 2982, 2986 (1973); *Public Funds for Public Schools of N.J. v. Marburger*, 358 F. Supp. 29, 33-36 (D. N.J. 1973); *Wolman v. Essex*, 342 F. Supp. 399, 412 (S.D. Ohio 1972), *aff'd.* ___ U.S. ___, 93 S. Ct. 61 (1972); *Kosydar v. Wolman*, 353 F. Supp. 744, 753-755 (S.D. Ohio 1972), *aff'd. sub. nom.; Grit v. Wolman*, _____U.S. ___, 93 S. Ct. 3062 (1973).

III.

Act 195 and the Secular Textbook Loan Program

The providing of secular textbooks to nonpublic school children under Act 195, 24 P.S. Section 9-972, is the one section of these two acts which might best

withstand a First Amendment attack and pass constitutional muster. One of my reservations about this program, and generally for that matter a fatal reservation regarding the other three programs, pertains to the wording of the statute itself as it is particularly embodied and expressed in its legislative findings and declaration of legislative policy. The legislative drafting accentuates the special class appearance which permeates the entire statutory framework.

Everson v. Board of Education of Ewing Tp., 330 U.S. 1, 67 S. Ct. 504 (1947) and *Board of Education of Cent. Sch. Dist. No. 1. v. Allen*, 392 U.S. 236, 88 S. Ct. 1923 (1968) are the two authorities enunciating the relevant criteria most apposite here.[6]

In *Everson* the Court found it to be constitutionally permissible for the state to offer free access to public transportation to and from school for all school children, including those in attendance at nonpublic schools. The *Allen* ruling extended *Everson* to immunize the loaning of secular textbooks to all children throughout the state for designated grades; encompassing both nonpublic and

6. Cochran v. Louisiana State Board of Education, 281 U.S. 370, 50 S. Ct. 335 (1930), was not decided on First Amendment grounds, but rather was bottomed on a finding that neither Section 4 of Article IV of the United States Constitution, guaranteeing to every state a republican form of government, nor the Fourteenth Amendment forbidding an unconstitutional taking of property for private use, had been violated when free books were provided by the state to all school children.

public school children. For each statute there was no question that the general benefits provided thereunder would inure to all the children in the state, thus avoiding any inference that a certain class had been singled out to receive state aid.

The *Everson* statute specifically stated:

> "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.
>
> "When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part." 330 U.S. at 3, 67 S. Ct. at 505 n. 1.

The text of the *Allen* statute substantially tracked the wording of *Everson*:

> "In the several cities and school districts of the state, boards of education, trustees of such body or officers as perform the function of such boards shall have the power and duty to purchase

> and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks. Textbooks loaned to children enrolled in grades seven to twelve of said private schools shall be textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such textbooks are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities." 392 U.S. at 239, 88 S. Ct. at 1924 N. 3.

Juxtaposing Act 195, 24 P.S. Section 9-972(a), under attack here to the *Everson* and *Allen* statutes, one can contrast the legislative drafting technique employed:

> "9-972. Loan of textbooks, instructional materials and equipment, nonpublic school children.
>
> (a) Legislative Findings: Declaration of Policy.
>
> The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth,

> textbooks and instrumental materials free of charge to children attending public schools within the Commonwealth. Approximately one-quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this act, attend nonpublic schools. Although their parents are taxpayers of the Commonwealth, these children do not receive textbooks or instructional materials from the Commonwealth. It is the intent of the General Assembly by this enactment to assure such a distribution of such educational aids that every school child in the Commonwealth will equitably share in the benefits thereof."

Though the intent of the legislature in each instance was obviously and undoubtedly identical, that is, to extend some basic secular services to all children irrespective of the school attended, the Pennsylvania statute is more susceptible to a constitutional challenge than its predecessors. See also *Marburger*, *supra*, 358 F. Supp. at 35-36 and other cases cited on page 7 *supra*.

A more troublesome aspect of this program is the potential for excessive entanglement of Church and State. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S. Ct. 2105, 2111 (1971) articulated the three-prong test courts should follow in analyzing the multifarious legislative schemes adopted.

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392

> U.S. 236, 243, 88 S. Ct. 1923, 1926, 20 L.Ed. 2d 1060 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' Walz, supra, at 674, 90 S. Ct. at 1414."

The plaintiffs concede that the Acts 194 and 195 evince a secular legislative purpose. Passing over for the moment the second requirement that the statute not be such that its primary or principal effect either advances or inhibits religion, I will consider the third criterion commanding that there be no excessive entanglement of the government and religion.

The Court's decision to consolidate the hearing on plaintiffs' motion for a preliminary injunction pursuant to Fed. R. Civ. P. 65(a)(2) necessitates that any analysis should not be restricted solely to facial unconstitutionality but additionally should examine whether the application, implementation, or construction of the statute is constitutionally repugnant.

In the case at bar the Commonwealth has promulgated "Guidelines for the Administration of Acts 194 and 195," and therefore I can scrutinize the regulations in conjunction with the statutes. *Allen* preceded *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 90 S. Ct. 1409 (1970) and thus the entanglement requirement introduced in *Walz* was not directly raised or considered in *Allen*. *Lemon v. Kurtzman*, 403 U.S. at 613-614, 91 S. Ct. at 2111-2112, held constitutionally infirm a Pennsylvania statute on the ground of excessive entanglement without reaching whether the scheme was equally violative under the

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"effect" test. On the other hand, the Court struck down the Pennsylvania and New York statutes on the primary effect bar in *Sloan v. Lemon*, ___U.S.___, 93 S. Ct. at 2982 n. 8; *Committee for Public Ed. & Religious Lib. v. Nyquist*, ____U.S.___, 93 S. Ct. 2955, 2969 (1973); and *Levitt v. Committee for Public Ed. & Religious Lib.*, ___ U.S.__, 93 S. Ct. 2814, 2818-2820 (1973).

Unlike the regulations upheld by the Court in *Allen* the administrative regulations of the Commonwealth are much more intrusive, cumbersome and detailed, bringing the Commonwealth into frequent association with the nonpublic schools. Though the Court there did not invalidate the administrative procedure utilized by the state notwithstanding the intermediate intervention of the nonpublic schools, the operation in the instant case extends beyond the practice permitted then. The legislative approach in *Allen* was found not to be constitutionally flawed even though the individual pupil requests for secular books were filed initially with the nonpublic school and the nonpublic school would prepare summaries forwarding those to the Board of Education. 392 U.S. at 244, 88 S. Ct. at 1926-1927 n. 6. Storing the textbooks on the premises of the nonpublic schools was similarly constitutionally tolerated.

Section 4 of the Commonwealth's Guidelines explicates the operative procedures the nonpublic schools and their pupils should follow to receive the books made available through Act 195. Sections 4.3, 4.4, 4.6, 4.7, 4.9, 4.10, 4.11 and 4.13 of the Guidelines, set forth below, point out some of the entanglement features of the Act.

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Sections 4.3 and 4.6 provide:

> "4.3 Each nonpublic school shall submit on or before October 15 for the initial year and on or before March 1 thereafter a loan request for the desired textbooks to the Department of Education. The requests will be of standard format and will be distributed by the Department of Education prior to October 1 of the initial year and on or before February 15 of each year thereafter, to each nonpublic school or the appropriate chief administrator. The request shall not exceed 80 per cent of the total allocation."[7]

---

7. Section 4.3 of the Guidelines was revised by the Secretary of Education in March, 1973, and now reads:

> "Each nonpublic school shall submit on or before May 15 for the 1973-74 school year and on or before March 1 thereafter a loan request for the desired 'textbooks' to the Department of Education. The requests will be of standard format and will be distributed by the Department of Education prior to April 15 for 1973-74 school year and on or before February 15 of each year thereafter, to each nonpublic school or the appropriate chief administrator. The request shall not exceed 80 per cent of the total allocation."

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"4.6 Textbooks requested will be shipped directly to the appropriate nonpublic school."

Exhibit D-9,[8] reprinted in the footnote, is the form prepared by the Department of Education which students should complete for the books. Evidently the Department of Education sends the forms directly to the nonpublic schools, the schools in turn forward them to the parents who fill them out and return them not to the Secretary of Education, thus contrary to what the forms connote, but rather to the school from which they received the forms.[9]

8. Exhibit D-9 provides:

"TO:
SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

CERTIFICATE OF INDIVIDUAL REQUEST
FOR LOAN OF TEXTBOOKS

"I hereby request the loan of textbooks and instructional materials in accordance with Pennsylvania Act 195 — 1972 for my child(ren) attending

_____
(School) (City) (Zip)

"Date: _____ (Signed) _____
(Parent or Guardian)

"*N.B. This law is applicable to Pennsylvania residents attending schools in Pennsylvania only.*"

9. Exhibit D-17 is the text of a letter mailed by one sectarian school principal to parents of children enrolled in that nonpublic school. There is nothing in the record to discredit the second paragraph of the letter and as a matter of practice this probably would be the manner in which the book transfer process operates.

(Cont'd)

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Therefore, as in *Allen*, and as stated in Section 4.3 of the Commonwealth's Guidelines, the nonpublic school totals the number of individual requests and transmits this figure to the Department of Education. According to Section 4.6, the books are then transported not to the children but to the nonpublic schools which distribute them to the children.[10] Thus, to a limited degree this resembles the procedure which was approved in *Allen* on a record, I might add, which was far more exiguous than that presented to this Court.

The *Allen* procedure however has been further distended in the instant case. Section 4.4 of the Guidelines provides:

(Cont'd)

"Dear Parent:

"Pennsylvania law, Act 195, November 1972, provides for the loan of some textbooks and instructional materials to students of nonpublic schools. We are, therefore, happy to be able to extend to you a credit of $9.70 per student toward the purchase of textbooks; the instructional materials will be made available to the classroom. This credit will be deducted from the student's book bill in September.

Please sign the enclosed card and *return to the school as soon as possible*. Your prompt cooperation in this matter will be appreciated. (Emphasis added.)

Very truly yours, "

10. It is not clear from Allen whether, once the figure indicating the number of books needed had been computed and conveyed to the Board of Education, the books were sent directly to the children or to the school. The fact that the books could be kept on the premises suggests that the books were shipped to the schools.

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"Five per cent should be allowed in the purchase request for transportation allowances."

Section 4.7 states:

"The Department of Education is responsible for fiscal control, fund accounting and maintaining records for the acquisition of the textbooks."

While Section 4.7 suggests that the accounting operations would be centralized, entailing minimal contact with the nonpublic schools and thus not necessitating the "comprehensive, discriminating and continuing state surveillance" condemned in *Lemon v. Kurtzman*, 403 U.S. at 619, 91 S. Ct. at 2114, other sections of the Guidelines negate any contention that the Commonwealth's administrative intrusion would only be slight, infrequent or occasional.

Section 4.9 admonishes:

"Each nonpublic school shall be responsible for any expenditures in excess of its allocations."

A reading of Sections 4.10 and 4.11 re-emphasizes the legislative drafting shortcomings. Section 4.10 states in relevant part:

"Textbooks *loaned to the nonpublic schools:* (a) shall be maintained on an inventory by the nonpublic school." (Emphasis added.)

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Section 4.11 provides:

"It is presumed that textbooks on *loan to nonpublic schools* after a period of time will be lost, missing, obsolete or worn out. This information should be communicated to the Department of Education. After a period of six years, textbooks shall be declared unservicable and the disposal of such shall be at the discretion of the Secretary of Education." (Emphasis added.)

Viewing the regulations as *in pari materia* and integral components of Act 195, serious questions are raised in my mind as to whether the books are in fact loaned directly to the children as in *Allen* or really if this portion of the Act is merely nothing more than an elaborately contrived subterfuge designed to principally aid nonpublic schools which are fundamentally and preponderantly church-related.[11]

11. In Allen, the Court additionally observed that parents of nonpublic school children had presumably been required to purchase textbooks. According to the Commonwealth's proposed pretrial order, nonpublic school children prior to Act 195 similarly had to purchase their own textbooks. The record in this case however does not disclose whether separate book fees were charged by the school to which the parents under Act 195 could now expect a pro-rata deduction or if parents paid a fixed tuition for their children at nonpublic schools and this tuition encompassed any and all school expenses attendant to enrolling in that school. There is nothing in the Act 195 compelling the nonpublic schools to credit the parent's account and not use the money formerly allocated for secular books for other purposes *Cf.* Nyquist, *supra*, ____ U.S. __ , 93 S. Ct. at 2969. "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in nonpublic schools is invalid." See also ___ U.S. ___,93 S. Ct. at __ .

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A final example of potentially hazardous entanglement of Church and State is Section 4.13 of the Guidelines:

> "The nonpublic school or the agency which it is a member shall be responsible for maintaining on future certificates of requests from parents of children for all textbook materials loaned to them under this Act. The file must be open to inspection for the appropriate authority. A letter certifying the certificates on file shall accompany all loan requests."

Upon considering (1) the special class nature of the legislation, (2) the excessive administrative entanglement features of the Act, and (3) the potential that the Act serves as a boon to nonpublic schools because of the primary aid which could be diverted for sectarian functions unless there was strict compliance by the nonpublic school administrators, I am not completely free from doubt as to the constitutionality of even this provision which allocates secular books by the Commonwealth to children enrolled in nonpublic schools. Certainly, defendants have not patently established the constitutionality of this provision. Yet, despite my almost agonizing doubts on this extremely close question, I resolve the issue of constitutionality in favor of the provision of the statute which loans secular books to students at nonpublic schools. But in making this resolution I must note that by the barest scintilla possible the book provision avoids intrusion into the zone of unconstitutionality.

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IV.

Act 194 and the Auxiliary Services Program

Turning to Act 194, the authority mandating the provision of auxiliary services for nonpublic school children, the Court is confronted with a novel and intriguing legislative scheme enabling nonpublic schools to receive some secular services from the Commonwealth. While I reluctantly concur with the majority as respects the loaning of secular textbooks, I am unable to arrive at the same conclusion for the auxiliary services, the instructional equipment or the instructional materials. The approbation of this approach can produce far-reaching, sweeping, and monumental consequences for Church-State relations, for at bottom the seminal question presented is whether a state can achieve in an indirect, circumlocutious fashion what it is constitutionally barred from doing directly. Phrased differently, can the Commonwealth of Pennsylvania via Intermediate Units, which are duly authorized state agencies, circumvent the First Amendment restraints which historically have been engrained and implanted in the constitutional matrix of this country? I earnestly do not believe so.

First, the program of auxiliary services is plagued by the same legislative drafting defect alluded to in the previous discussion of the loaning of secular textbooks. In essence the special class of sectarian schools has been isolated for receipt of state supportive services.

Secondly, the plaintiffs' position in regard to the auxiliary services should be stated here:

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"We [the plaintiffs] do not challenge the right of parochial school children to obtain the auxiliary services provided by the statutes or the constitutional authority of the Commonwealth to provide those services to them. We challenge only the power to supply the services on church-owned and church-controlled premises as part of the program of parochial school education under church sponsorship. We recognize that requiring the children to come to publicly controlled neutral premises to receive publicly administered services may be less convenient than the form of administration authorized by the statutes. But, this is no less true with respect to any of the numerous forms of aid that the Supreme Court has ruled unconstitutional." Plaintiffs' Supplemental Brief at 2.

In contrast to Act 195 and the loaning of textbooks, (1) these auxiliary services are being provided on the premises of the nonpublic schools and (2) teachers, unlike textbooks are not fungible, the former not being inanimate objects totally devoid of emotions, feelings or opinions. Nor can it be gainsaid that the Intermediate Unit is any less an organ of the Commonwealth, and thus it is subject to the same constitutional proscriptions incumbent on the state.

The Commonwealth's plan calls for the Intermediate Unit to hire these teachers rather than the nonpublic schools, and the teachers are of course accountable to the Intermediate Unit for their professional conduct and the conscientious performance of their duties. But these

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precautionary measures still cannot permit one to inescapably avoid the conclusion that some assurance must be made that when these teachers are thrust into a religious environment, their secular functions do not become inextricably entwined with the sectarian character of the school.

In *Earley v. DiCenso*, 403 U.S. 602, 91 S. Ct. 2105 (1971) the Court repudiated Rhode Island's attempt to supplement the salaries of teachers of secular subjects in nonpublic schools. The Court rejected the argument that teachers would not mix religion with the secular subjects which they were charged with teaching:

> "We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faiths are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. . . . Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

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We do not assume, however, that parochial school teachers will be unsuccessful in thier attempts to segregate their religious beliefs from their secular educational responsibilities. But the potential for impermissible fostering of religion is present. The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachings under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . .

* * *

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed. *Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.* These prophylactic contacts will involve excessive and enduring entanglement between state and church." 403 U.S. at 618-619, 91 S. Ct. at 2114. (Emphasis added.)

No more or less is expected and demanded of the Commonwealth in the instant case. While the Commonwealth's procedure is probably more restricted and less disturbing than that present in *DiCenso, supra*, some state surveillance must be maintained and that intrusion in my view would require excessive embroilment of Church and State violative of the Establishment Clause

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of the First Amendment. Moreover, I do not believe that the Commonwealth's complacent reliance upon the professional integrity of the teachers alone adequately provides the requisite assurance of compliance with the First Amendment. The Supreme Court in *DiCenso* clearly refuted any contention that the state can, absent repeated prophylactic contacts with the institutions, ensure that state-subsidized teachers in nonpublic schools comport with constitutional limitations and standards.

Furthermore, the Commonwealth's history of assigning nurses to nonpublic schools pursuant to 24 P.S. Section 14-1402 does not save Act 194.[12] Without passing

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12. 24 P.S. Section 14-1402 provides:

Health services

"(a) Each child of school age shall be given, (1) a vision test annually by a school nurse, medical technician or teacher, (2) a hearing test employing an audiometer at least once every year in the elementary grades and once every two years in secondary grades by a school nurse or medical technician, (3) a measurement of height and weight at least once annually by a school nurse or teacher, and (4) a chest X-ray by a medical technician when the child is in high school.

(a-1) Every child of school age shall be provided with public nurse services.

(b) For each child of school age, a comprehensive health record shall be maintained by the school district or joining school board, which shall include the results of the tests, measurements and regularly scheduled examinations and special examinations herein specified.

(Cont'd)

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(Cont'd)

(c) Medical questionnaires, suitable for diagnostic purposes, furnished by the Secretary of Health and completed by the child or by the child's parent or guardian, at such time as the Secretary of Health may direct, shall become a part of the child's health record.

(d) All teachers shall report to the school nurse or school physician any unusual behavior, changes in physical appearance, changes in attendance habits and changes in scholastic achievement, which may indicate impairment of a child's health. The nurse or school physician or school dentist may, upon referral by the teacher or on his own initiative, advise a child or parent or guardian of the apparent need for a special medical or dental examination. If a parent or guardian fails to report the results to the nurse or school physician, the nurse or school physician shall arrange a special medical examination for the child.

(e) The school physicians of each district or joint board shall make a medical examination and a comprehensive appraisal of the health of every child of school age, (1) upon original entry into school in the Commonwealth, (2) while in sixth grade, (3) while in eleventh grade, and (4) prior to the issuance of a farm or domestic service permit unless the child has been given a scheduled or special medical examination within the preceding four months. The health record of the child shall be made available to the school physician at the time of the regularly scheduled health appraisals.

(f) The Secretary of Health, upon petition of the school board or joint school board or on his own initiative with the concurrence of the school board or joint school board, may modify the individual school districts the school health services program specified in this section. The program as modified shall conform to approved medical or dental practices and shall permit valid statistical appraisals of the various components of the program."

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upon the validity of that practice, suffice it to say that while a speech therapist's tasks arguably could be considered as providing health care, I do not view them as synonymous with or comparable to the duties of nurses or doctors, or dentists. And certainly no respectable argument can be advanced for according guidance counselors this favorable inference. Finally, the drafting of 24 P.S. Sections 14-1401 and 14-1402 more clearly exemplifies statutes whose benefits provided thereunder are uniformly applicable to a general class.[13]

13. 24 P.S. Section 14-1401 reads:

Definitions

"As used in this article —

(1) 'Children of school age' or 'child of school age' means every child attending or who should attend an elementary grade or high school, whether public or private, within the Commonwealth and children who are attending a kindergarten which is an integral part of a local school district.

(2) 'Teachers' means professional employes, temporary professional employes and substitutes and instructors in public or private schools within the Commonwealth.

(3) 'Other employes' means janitors, bus drivers, cooks and other cafeteria help and all others employed at schools.

(4) 'School physician' means a physician legally qualified to practice medicine and surgery or osteopathy or osteopathic surgery in the Commonwealth, who has been appointed or approved by the Secretary of Health.

(Cont'd)

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(Cont'd)

(5) 'School dentist' means doctor of dental surgery or dental medicine legally qualified to practice dentistry in the Commonwealth, who has been appointed or approved by the Secretary of Health.

(6) 'Family physician' means either a doctor of medicine legally qualified to practice medicine and surgery in the Commonwealth, or an osteopath or osteopathic surgeon legally qualified to practice osteopathy or osteopathic surgery in the Commonwealth, who has been designated by the parent or guardian as the personal physician of the child.

(7) 'Family dentist' means a doctor of dental surgery or dental medicine legally qualified to practice dentistry in the Commonwealth, who has been designated by the parent or guardian as the personal dentist of the child.

(8) 'School nurse' means a licensed registered nurse who is assigned to a school district or joint school board, or a licensed registered nurse properly certificated by the Superintendent of Public Instruction as a school nurse who is employed by a school district or joint school board as a school nurse. The employment of any nurse employed by a school district or joint school board as a school nurse prior to the effective date of this act shall not be affected by a contract for school health services that may be entered into by any school district or joint school board under the provisions of this act.

(9) 'Dental hygienist' means a dental hygienist licensed by the State Dental Council and Examining Board, who is assigned to a school district or joint school board or a dental hygienist licensed by the State Dental Council and Examining Board and certificated as a school dental hygienist by the Superintendent of Public Instruction, who is employed by a school district or joint school board as a dental hygienist. The employment of any dental hygienist employed by a school district or joint school board as a

(Cont'd)

Dissenting Opinion

V.

Act 195 and the Instruction Materials Program

The validity *vel non* of the instructional materials provisions of Act 195 is in many ways undistinguishable from the secular book provision. Nonetheless, for reasons which hereinafter follow, I find this program is constitutionally infirm under the First Amendment.

The invalidation of the instructional materials provision revolves more around primary effect than entanglement, although any administrative objections hereinafter noted for instructional equipment in Section VI, *infra*, are equally applicable to the instructional materials.

(Cont'd)

dental hygienist prior to the effective date of this act shall not be affected by a contract for school health services that may be entered into by any school district or joint school board under the provisions of this act.

(10) 'Medical technician' means a person skilled in the operation of X-ray or other diagnostic equipment having such training and experience as required by the Secretary of Health.

(11) 'Sanitarian' means a person having such training and experience as required by the Secretary of Health and qualified to conduct sanitary inspections of school buildings and grounds in connection with water supply, sewage and refuse disposal, food service, heating, lighting, ventilation and safety."

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Section 1.12 of the Guidelines defines the kinds of materials available:

> "Instructional Materials shall mean books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparencies, films, filmstrips, kinescopes and video tapes, or any other printed or published materials of a similar nature made by any method now developed or hereafter to be developed. The term includes such other secular, neutral, nonideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth."

Section 3.16 of the Guidelines notes in part:

> "Inventory of Instructional Equipment and Materials
>
> "a. Instructional materials loaned to the nonpublic schools shall be maintained on an inventory by both the nonpublic and the appropriate intermediate unit.
>
> b. It is presumed that instructional materials on loan to nonpublic schools after a period of time will be lost, missing, obsolete or worn out. These items should be so noted on an annual inventory."

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Moreover, Sections 3.17(a) and 3.13(b) of the Guidelines, more fully described in Section VI., *infra*, must be complied with by the nonpublic schools.

A cardinal distinction between approving the loaning of secular books and the panning of instructional materials would be that ostensibly books are given directly to the children and derivatively the benefits are extended to their parents without any primary effect of aiding or inhibiting religion. Secondly, the costs of secular books are relatively nominal in contrast to the financial magnitude of the program here.

The crux of the case for me is whether you can by sophisticated accounting methods fund only secular programs in nonpublic schools, recognizing that a substantial monetary benefit is realized by the sectarian organization, without primarily aiding or advancing religion. For me the answer is unequivocally, emphatically and resoundingly NO. The primary effect gloss of such funding was first broached by Circuit Judge Coffin in *DiCenso v. Robinson*, 316 F. Supp. 112, 119-120 (D.R.I. 1970), reiterated by Circuit Judge Anderson in *Johnson v. Sanders*, 319 F. Supp. 421, 424-434 (D. Conn. 1970), *aff'd* 403 U.S. 955, 91 S. Ct. 2292 (1971), and the ramifications articulated by Judge Gurfein in *Committee for Public Education and Relig. Lib. v. Nyquist*, 350 F. Supp. 655, 665-667 (S.D.N.Y. 1972).

Judge Anderson's incisive and most lucid comments in *Johnson*, *supra*, 319 F. Supp. at 424-434, should not go unheeded. After an exhaustive legal analysis, he concluded:

"Reason demands some outer limit to the defendants' contention that public funds and controls which are not literally earmarked to pay for or regulate religious instruction or observances can never be said to sponsor or otherwise establish an institution which is built around them. Abstract discussion of secular functions must not obscure the realities of how institutions such as schools operate. At one pole, it is clear that payment of aid directly to a religiously-affiliated educational institution does not automatically establish religion just because the sectarian activities of a school may be enhanced by anything which makes it more convenient for children to attend it. See Walz v. Tax Commission of City of New York, 397 U.S. at 671, 90 S. Ct. 1409, 25 L.Ed., 2d 697. But at the other extreme, a law which converts a school's entire task of providing secular instruction from a purely private to a predominately state responsibility, while permitting religious instruction to continue unaltered, would constitute sponsorship of the school — the physical and administrative facility through which religion is taught — even if all public funds were formally designated to be spent for functions other than teaching religion. The test for this sort of institutional sponsorship, which is a variety of 'excessive government entanglement with religion' analogous to 'releasing' public school students for private religious instruction in their schools, is 'inescapably one of degree.' See Walz v. Tax Commission of City of New York, 397 U.S. at 674,

90 S. Ct. 1409, 25 L.Ed. 2d 697. If a law authorizes a religious group to participate in a contractual education program which requires the state to assume sponsorship of its entire non-religious scholastic curriculum, then the institution receiving funds and being regulated must be tested by standards of religious neutrality similar to those required of a public school." Id. at 433-434.

The use of Intermediate Units as conduits does not save this program or remove any constitutional defects. The benefits are as substantial for the nonpublic schools whether the money is paid to them directly or the materials are paid for by someone else. The Commonwealth's procedure mitigates the *entanglement* defect, but it does not avoid the *primary effect* shortcoming. Constitutional vulnerability is predicated on a disjunctive reading of the standards rather than requiring the conjunctive presence of all three criteria.

Thus, either on primary effect or entanglement grounds, this program should not be salvaged.

VI.

Act 195 and the Instructional Equipment Program

Providing instructional equipment under Act 195 to nonpublic schools similarly must not be upheld. Loaning of secular instructional equipment to nonpublic schools will require the same "comprehensive, discriminating and

Dissenting Opinion

continuing state surveillance" stricken down in *Lemon v. Kurtzman*, 403 U.S. at 619, 91 S. Ct. at 2114. The majority, recognizing that at least for some equipment there will be a potential for constitutional abuse, considers severance an adequate remedy for rectifying this. One of my disagreements with the Court is the inadequate weight accorded the primary effect consequences of this legislation. A second area of difference is the intrusive entanglement of the nonpublic schools with the Commonwealth which the majority here minimizes and discounts.

Rather than "purchasing" the "secular educational services" from nonpublic schools as in *Lemon v. Kurtzman*, 403 U.S. at 609, 91 S. Ct. at 2109, the Commonwealth authorizes the Intermediate Unit to acquire this equipment and then loan it directly to the nonpublic schools. This procedure mitigates the previous approach of the Commonwealth by avoiding the provision of direct state financial aid via cash grants to the sectarian schools. *Id.* at 621, 91 S. Ct. at 2115.

Section 1.13 of the Guidelines defines the wide variety of equipment available under the Act:

> "Instructional Equipment shall mean instructional equipment, other than fixtures annexed to and forming part of the real estate, which is suitable for and to be used by children and/or teachers. The term includes but is not limited to projection equipment, recording equipment, laboratory equipment and any other

Dissenting Opinion

> educational secular, neutral, nonideological equipment as may be of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth."

While projection equipment and recording equipment *per se* may be religiously neutral, this equipment can be misused and the carefully drawn statute of the legislature can be circumvented. A projector can be utilized to show religious films as easily as can the recording equipment be used to play records or tapes in a particular denominational vein.

Section 3.16 of the Guidelines provides in relevant parts:

> "Inventory of Instructional Equipment and Materials
>
> * * *
>
> "c. Instructional equipment loaned to nonpublic schools shall be maintained on an inventory by both nonpublic schools and the appropriate intermediate unit. After a period of 10 years these items shall be declared unservicable and the disposal of such shall be at the discretion of the Secretary of Education.
>
> d. Each nonpublic school shall submit to the local intermediate unit an inventory of all

> instructional materials and equipment on loan on or before June 1 of each fiscal year. Each intermediate unit should submit to the Secretary of Education a composite inventory of all instructional materials and equipment on loan, on or before June 30 of each fiscal year."

Section 3.17 further states:

> "Payment
>
> > "A. The intermediate unit will receive the allocations for the nonpublic school children and render the necessary accounting procedures and reports."

Read in conjunction with 3.17(a) should be Section 3.13(b):

> "Each nonpublic school shall be responsible to insure that requests for expenditures shall not exceed allocations. In the event that this occurs it is understood that each nonpublic school shall be responsible for any expenditure in excess of its allocation."

In *Lemon v. Kurtzman*, 403 U.S. at 621, 91 S. Ct. at 2115, the power of the Commonwealth to conduct a post-audit of the secterian school's financial records was singled out as being indicative of the entangling relationship between Church and State which should be eschewed. Moreover, the Court was wary of regulations which might be promulgated in order to implement any of

the programs. Thus, the *potential* for entanglement as much as the actual practices in existence, alarmed the Court and was an important, if not overriding, concern in reaching its judgment.

Wholly apart from the vitiating administrative facets of Act 195 hereinbefore mentioned, the majority appears to minimize as beingconstitutionally insignificant the fact that the instructional equipment and instructional materials are given to the schools rather than the children as is the case for the textbooks. Nothing in the Act compels the schools to maintain any minimum level of expenditures as an offset for receipt of these items. In effect, the Court is saying that whenever a state provides purely secular equipment for a religious school, there can be no primary effect of advancing or inhibiting religion irrespective of the extent of the economic assistance to the institution. This is a conclusion which I am unable to fully accept. The majority reads the First Amendment restrictions in an exceedingly narrow fashion. Thus this neat categorization and compartmentalization purportedly enable the Commonwealth to pay for only secular equipment which in the past was entirely paid for by the nonpublic schools, now freeing the schools' monies for sectarian uses. To me, this is a clear sponsorship of religion by the Commonwealth without exacting any correlative promises that these benefits are administered in a constitutionally nondiscriminatory fashion.

The class nature of this legislation with its primary effect overtones as well as the ongoing administrative entanglement aspects of the Act leads me to the same conclusion that this program should not be sustained in any part.

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VII.

Political Divisiveness, the Free Exercise Clause, and the Equal Protection Clause

Defendants have also attempted to analogize these programs to those approved in *Walz v. Tax Commission of City of New York, supra; Tilton v. Richardson*, 403 U.S. 672, 91 S. Ct. 2091 (1971); and *Hunt v. McNair*, ____U.S. ___, 93 S. Ct. 2868 (1973). Any reliance upon those authorities is misplaced, as the factual underpinnings of those cases are clearly distinguishable.

We do not have as in *Walz*, 397 U.S. at 678, 90 S. Ct. at 1416, the tradition and experiences of two centuries of uninterrupted freedom from taxation for churches. Nor as in *Tilton* and *Hunt* does this case involve (1) a "one-time, single-purpose construction grant," *Tilton, supra*, 403 U.S. at 688, 91 S. Ct. at 2100; (2) to a *college* whose students are less impressionable and where presumably less emphasis is placed on religious indoctrination;[14] and (3) where the nature of the program entails limited government surveillance in order to fully comport with the First Amendment guarantees.

Moreover, the potential for political divisiveness and dissention adumbrated by Chief Justice Burger in *Lemon*

14. The Commonwealth conceded, after examination by the Court during argument on the propriety of the preliminary injunction, that at least the 986 Roman Catholic Diocesan Schools in the Commonwealth eligible under Acts 194 and 195 have a religious purpose. See N.T. of September 13, 1973 at 161.

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v. Kurtzman, 403 U.S. at 623-625, 91 S. Ct. at 2116-2117, is equally controlling here and extremely compelling:

> "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow.
>
> * * *
>
> "We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but is a force to be reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the 'verge' of the precipice lies. As well as constituting an independent evil against

> which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal."[15]

Other arguments urged by the proponents of these programs must similarly be rejected as unfounded and unsound. In *Committee for Public Ed. & Religious Lib. v. Nyquist*, ____U.S. ____. 93 S. Ct. at 2973, Mr. Justice Powell, writing for the Court, almost summarily dismissed any contention predicated on the Free Exercise Clause of a right to state aid.

> "It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 1070 (1925). It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists

15. See also concurring comments of Mr. Justice Harlan in Walz v. Tax Commission of City of New York, 397 U.S. at 699, 90 S. Ct. at 1427:

> 'Subsidies, unlike exemptions, must be passed on periodically and thus invite more political controversy than exemptions. Moreover, subsidies or direct aid, as a general rule, are granted on the basis of enumerated and more complicated qualifications and frequently involve the state in administration to a higher degree, though to be sure, this is not necessarily the case."

> between the Free Exercise and the Establishment Clauses, e.g., Everson v. Board of Education, supra; Walz v. Tax Commission, supra, and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion. In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one 'advancing' religion. However great our sympathy, Everson v. Board of Education, supra, 330 U.S. at 18, 67 S. Ct. at 513 (Jackson, J., dissenting), for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of 'conscience and discipline,' ibid., and notwithstanding the 'high social importance' of the State's purposes, Wisconsin v. Yoder, 406 U.S. 205, 214, 92 S. Ct. 1526, 1533, 32 L.Ed. 2d 15 (1972), neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted." (Footnote omitted).

Accord, *Johnson v. Sanders*, *supra*, 319 F.Supp. at 435; *Wolman v. Essex*, *supra*, 342 F.Supp. at 418-419; *Kosydar v. Wolman*, *supra*, 353 F.Supp. at 764.

Another argument of the defendants premised on the Equal Protection Clause can additionally be given short shrift. Chief Justice Burger, while concededly addressing a different constitutional question, spoke of the interplay

between the Equal Protection Clause and the First Amendment. In *Norwood v. Harrison*, ___ U.S. ___ , 93 S. Ct. 2804, 2809 (1973), where the Court barred nonpublic schools engaged in racial discrimination from receiving free textbooks from the state, the Chief Justice reasoned:

> "Appellees fail to recognize the limited scope of Pierce when they urge that the rights of parents to send their children to private schools under that holding is at stake in this case. The suggestion is made that the rights of parents under Pierce would be undermined were the lending of free textbooks denied to those who attend private schools — in other words, that school children who attend private schools might be deprived of the equal protection of the laws were they invidiously classified under the state textbook loan program simply because their parents had exercised the constitutionally protected choice to send the children to private schools.

We do not see the issue in appellees' terms. In Pierce, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. *It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of*

private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.

The appellees intimate that the State must provide assistance to private schools equivalent to that it provides to public schools without regard to whether the private schools discriminate on racial grounds. Clearly, the State need not. Even as to church-sponsored schools, whose policies are non-discriminatory, any absolute right to equal aid was negated, at least by implication, in Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed. 2d 745 (1971). The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. Even assuming, therefore, that the Equal Protection Clauses might require state aid to be granted to private nonsectarian schools in some circumstances — health care or textbooks, for example — a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance. See San Antonio Independent School District v. Rodriguez, ___ U.S. ___, 93 S. Ct. 1278, 36 L.Ed. 2d 16 (1973). In the same way, a State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without regard to constitutionally mandated standards forbidding state-supported discrimination. That the

Dissenting Opinion

> Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." (Emphasis added.)

In *Sloan v. Lemon, supra,* ____ U.S. ___ ,93 S. Ct. at 2987-2988, Mr. Justice Powell also refused to allow parents of children attending nonsectarian nonpublic schools in Pennsylvania to receive the tuition reimbursements. The severability clause was insufficient justification to exclude nonsectarian schools from the ban since it could not be presumed such legislation would have been enacted by the Commonwealth were it only to encompass such a small class of beneficiaries.

VIII.

Conclusion

Plaintiffs in my view are entitled to a preliminary injunction barring the expenditure of funds under Acts 194 and 195, except for the secular textbooks which I would permit. Because of this approach, I find it unnecessary to decide whether there is any free exercise violation to plaintiffs in that there was compulsory taxation for the support of religion or religious schools.

Tragically, some persons, before the ink here is hardly dry will claim that the dissent is anti-religious or fails to appreciate the importance of religion and religious education in our society. Such distortions would be far

Dissenting Opinion

from the truth. Each of my children as a matter of parental choice, has attended nonpublic schools which have a religious focus and are sponsored by a religious body. But it was a private choice; the taxpayers under the constitution are not permitted to pay the price for my religious preferences.

s/ A. Leon Higginbotham, Jr.
District Judge

APPENDIX B
FINAL ORDER OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA MEEK, et al — Civil Action

v. — No. 73-269

JOHN C. PITTENGER, et al

AND NOW, TO WIT, this 7th day of March, 1974, it is

ORDERED that the plaintiffs' application for a preliminary and a final injunction against the expenditure of Commonwealth funds pursuant to Act 194 is *denied;*

ORDERED that the plaintiffs' application for a preliminary and a final injunction against the expenditure of Commonwealth funds pursuant to Act 195 for the loan of textbooks is *denied*;

ORDERED that the plaintiffs' application for a preliminary and a final injunction against the expenditure of Commonwealth funds pursuant to Act 195 for the loan of instructional materials is *denied;* and

IT IS FURTHER ORDERED that the defendants, their agents, employees and successors in office, are preliminarily and finally enjoined from expending Commonwealth funds pursuant to Act 195 for the loaning of instructional equipment to any nonpublic school except such instructional equipment as from its nature cannot

readily be diverted to religious purposes, and is particularly designed or designated for such secular educational purposes as provided for in said statute and its accompanying duly-promulgated guidelines for the administration of such statute. The defendant, Commonwealth of Pennsylvania, and John C. Pittenger are directed to file with the Court within thirty (30) days of the date hereof an amendment to "Guidelines for the Administration of Acts 194 and 195" at Section 1.13 that shall provide the descriptive definition of the types of equipment that the said defendants intend to provide in order to comply with the Court's decision in respect to the instructional equipment features of Act 195.

Following compliance by the defendants with the foregoing provision of this decree with respect to the filing of the amendment to the guidelines, the Court shall consider what orders may be necessary to be filed in respect to recapture or disposition of equipment heretofore loaned by the Commonwealth under Act 195 and contrary to the Court's decision.

The Court shall retain jurisdiction for these supplementary proceedings only.

s/ John J. Gibbons
JOHN J. GIBBONS,
Circuit Judge

s/ Louis C. Bechtle
LOUIS C. BECHTLE,
District Judge

Final Order

Copies to:

William P. Thorn
J. Justin Blewitt
H. T. Reath
W. Bentley Ball
J.E. Gallagher, Jr.
3/7/74

I concur with the above order only to the extent where relief as granted or denied therein is consistent with my separate opinion of February 11, 1974, *viz.*, in my view the loaning of textbooks pursuant to Act 195 involves the only portions of the Acts which are constitutionally valid. Thus, all other grants are not constitutionally permissible.

s/ A. Leon Higginbotham, Jr.
A. LEON HIGGINBOTHAM, JR.
District Judge

(Stamped)
Filed
Mar 7, 1974
John J. Harding, Clerk

Copies to:

William P. Thorn
J. Justin Blewitt
H.T. Reath
W. Bentley Ball
J.E. Gallagher, Jr.
3/7/74

APPENDIX C
NOTICE OF APPEAL TO
UNITED STATES SUPREME COURT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNYSYLVANIA

CIVIL ACTION NO. 73-269

SYLVIA MEEK, et al.,

Plaintiffs,

v.

JOHN C. PITTINGER, et al.,

Defendants,

JOSE DIAZ, et al.

Intervening Parties Defendants.

Notice is hereby given that the plaintiffs herein appeal to the Supreme Court of the United States from that part of the final Order entered in this action on the 7th day of March, 1974 which denies the Plaintiffs' Application for a Petition for Injunction (a) against the expenditure of Commonwealth funds pursuant to Act 194, (b) against the expenditure of Commonwealth funds pursuant to Act 195 for the loan of textbooks, (c) against the expenditure of Commonwealth funds pursuant to Act 195 for the loan of instructional materials, and (d) against the expenditure of Commonwealth funds pursuant to Act 195 for

Notice of Appeal

instructional equipment which "from its nature cannot readily be diverted to religious purposes, and is particularly designed or designated for such secular educational purposes as provided for in said statute and its duly-promulgated guidelines for the administration of such statute."

This appeal is taken pursuant to 28 U.S.C. Section 1253.

March 20, 1973

William P. Thorn

Leo Pfeffer
Attorneys for Plaintiffs

John J. Harding, Clerk
U.S. District Court
Eastern District of Pennsylvania

cc:
J. Justin Blewitt, Jr., Esquire
William B. Ball, Esquire
C. Clark Hodgson, Jr., Esquire
Henry T. Reath, Esquire

APPENDIX D

ACT 194

Act 194
Approved 7-12-72

Printer's No. 2846

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2151 Session of 1972

INTRODUCED BY MESSRS. GALLAGHER, M. P. MULLEN, SCANLON, BELLOMINI, BERKES, IRVIS, DOMBROWSKI, MALADY, PRENDERGAST, ENGLEHART, HOMER, KESTER, FEE, RENWICK, DOYLE, O'DONNELL, YAHNER, MURTHA, COMER, MEBUS, FOX, BRUNNER, LEDERER, RIEGER, RUSH, SCHMITT, WRIGHT, JONES, RUANE, DORSEY, McMONAGLE, EARLY, RUGGIERO, R. K. HAMILTON, GEISLER, MYERS, NEEDHAM, BUTERA, CROWLEY, KATZ, J. H. HAMILTON, COPPOLINO, MASTRANGELO, BONETTO, NOVAK, RAPPAPORT, HALVERSON, CAPUTO, BURKHARDT, KNEPPER, MRS. GILETTE, MESSRS. RYBAK, PIEVSKY, MRS. KELLY, MRS. ANDERSON, MESSRS. MUSTO, M. M. MULLEN, LUTTY, GLEASON, MILLER, KLUNK, KLEPPER, FRANK J. LYNCH, GOODMAN, BIXLER and SCIRICA, MAY 10, 1972

REFERRED TO COMMITTEE ON EDUCATION, MAY 10, 1972

Act 194

AN ACT

Amending the act of March 10, 1949 (P.L. 30), entitled "An act relating to the public school system, including certain provisions applicable as well to private and parochial schools; amending, revising, consolidating and changing the laws relating thereto," providing for auxiliary services for the benefit of children attending nonpublic schools in the Commonwealth.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The act of March 10, 1949 (P.L. 30), known as the "Public School Code of 1949," is amended by adding a section to read:

Section 922-A. Auxiliary Services; Nonpublic School Children. — (a) Legislative finding; Declaration of Policy. The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth, auxiliary services free of charge to children attending public schools within the Commonwealth. Approximately one quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this act, attend nonpublic schools. Although their parents are taxpayers of the Commonwealth, these children do not receive auxiliary services from the Commonwealth. It is the intent of the

Act 194

General Assembly by this enactment to assure the providing of such auxiliary services in such a manner that every school child in the Commonwealth will equitably share in the benefits thereof.

(b) Definitions. The following terms, whenever used or referred to in this section, shall have the following meanings, except in those circumstances where the context clearly indicates otherwise:

"Nonpublic school" means any school, other than a public school within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of this act and which meet the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

"Auxiliary services" means guidance, counseling and testing services; psychological services; services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvment of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

(c) Provision of Services. Pursuant to rules and regulations established by the secretary, each intermediate unit shall provide auxiliary services to all children who are enrolled in grades kindergarten through twelve in nonpublic schools wherein the requirements of the compulsory attendance provisions of this act may be met

and which are located within the area served by the intermediate unit, such auxiliary services to be provided in their respective schools. The secretary shall each year apportion to each intermediate unit an amount equal to the cost of providing such services but in no case shall the amount apportioned be in excess of thirty dollars ($30) per pupil enrolled in nonpublic schools within the area served by the intermediate unit.

Section 2. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 3. This act shall take effect immediately.

APPENDIX D

ACT 195

Act 195
Approved 7-12-72

Printer's No. 2847

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2152 Session of 1972

INTRODUCED BY MESSRS. M. P. MULLEN, GALLAGHER, BELLOMINI, SCANLON, BERKES, DOMBROWSKI, MALADY, PRENDERGAST, ENGLEHART, HOMER, KESTER, FEE, RENWICK, DOYLE, O'DONNELL, YAHNER, MURTHA, COMER, MEBUS, FOX, BRUNNER, LEDERER, RIEGER, RUSH, SCHMITT, WRIGHT, JONES, RUANE, R. K. HAMILTON, GEISLER, MYERS, NEEDHAM, BUTERA, CROWLEY, KATZ, J.H. HAMILTON, COPPOLINO, MASTRANGELO, BONETTO, NOVAK, HALVERSON, KNEPPER, MRS. ANDERSON, MESSRS. PIEVSKY, PERRY, FRANK LYNCH, EARLY, KLUNK, MRS. KELLY, MESSRS. RAPPAPORT, GLEASON, MOORE, GOODMAN, SCIRICA, CAPUTO, BURKARDT, RYBAK, RUGGIERO, MUSTO, MEHOLCHICK, MRS. GILLETTE, MESSRS. MILLER and DORSEY, MAY 10, 1972

REFERRED TO COMMITTEE ON EDUCATION, MAY 10, 1972

AN ACT

Amending the act of March 10, 1949 (P.L. 30), entitled "An act relating to the public school system, including certain provisions applicable as well to private and parochial schools; amending, revising consolidating and changing the laws relating thereto," providing for the loan of textbooks and the furnishing of materials and equipment for the benefit of children attending nonpublic schools in the Commonwealth.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The act of March 10, 1949, known as the "Public School Code of 1949," is amended by adding a section to read:

Section 922-A. Loan of Textbooks, Instructional Materials and Equipment, Nonpublic School Children. — (a) Legislative Findings; Declaration of Policy. The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth, textbooks and instructional materials free of charge to children attending public schools within the Commonwealth. Approximately one quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this act, attend nonpublic schools. Although their parents are taxpayers of the

Commonwealth, these children do not receive textbooks or instructional materials from the Commonwealth. It is the intent of the General Assembly by this enactment to assure such a distribution of such educational aids that every school child in the Commonwealth will equitably share in the benefits thereof.

(b) Definitions. The following terms, whenever used or referred to in this section, shall have the following meanings, except in those circumstances where the context clearly indicates otherwise:

"Instructional equipment" means instructional equipment, other than fixtures annexed to and forming part of the real estate, which is suitable for and to be used by children and/or teachers. The term includes but is not limited to projection equipment, recording equipment, laboratory equipment, and any other educational secular, neutral, non-ideological equipment as may be of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

"Instructional materials" means books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparencies, films, filmstrips, kinescopes, and video tapes, or any other printed and

published materials of a similar nature made by any method now developed or hereafter to be developed. The term includes such other secular, neutral, non-ideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

"Nonpublic school" means any school, other than a public school within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of this act and which meet the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

"Textbooks" means books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group. Such textbooks shall be textbooks which are acceptable for use in any public, elementary, or secondary school of the Commonwealth.

(c) Loan of Textbooks. The Secretary of Education directly, or through the intermediate units, shall have the power and duty to purchase textbooks and, upon individual request, to loan them to all children residing in the Commonwealth who are enrolled in grades kindergarten through twelve of a

nonpublic school wherein the requirements of the compulsory attendance provisions of this act may be met. Such textbooks shall be loaned free to such children subject to such rules and regulations as may be prescribed by the Secretary of Education.

(d) Purchase of Books. The Secretary shall not be required to purchase or otherwise acquire textbooks, pursuant to this section, the total cost of which, in any school year, shall exceed an amount equal to ten dollars ($10) multiplied by the number of children residing in the Commonwealth who on the first day of October of such school year are enrolled in grades kindergarten through twelve of a nonpublic school within the Commonwealth in which the requirements of the compulsory attendance provisions of this act may be met.

(e) Purchase of Instructional Materials and Equipment. Pursuant to requests from the appropriate nonpublic school official on behalf of nonpublic school pupils, the Secretary of Education shall have the power and duty to purchase directly or through the intermediate units, or otherwise acquire, and to loan to such nonpublic schools, instructional materials and equipment, useful to the education of such children, the total cost of which, in any school year, shall be an amount equal to but not more than twenty-five dollars ($25) multiplied by the number of children residing in the Commonwealth who on the first day of October of such school year, are enrolled in grades kindergarten through twelve of a nonpublic

school in which the requirements of the compulsory attendance provisions of this act may be met.

Section 2. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 3. This act shall take effect immediately.

Supreme Court, U. S.
FILED
NOV 25 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1765.

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY COUNCIL and AMERICANS FOR SEPARATION OF CHURCH AND STATE,

Appellants,

v.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,

Appellees,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, et al.,

Intervening Parties Appellees.

Appeal From the United States District Court for the Eastern District of Pennsylvania.

FILED MARCH 20, 1974

PROBABLE JURISDICTION NOTED OCTOBER 15, 1974

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 73-269.

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL and AMERICANS UNITED FOR SEPARATION OF CHURCH and STATE

v.

JOHN C. PITTINGER, as Secretary of Education of the Commonwealth of Pennsylvania and Grace M. Sloan as Treasurer

---

Jose Diaz and Enilda Diaz, his wife, on their own behalf and as guardians of their minor children, Dalila, Jose, Jr., and Sergio Diaz; William Zimmerspitz and Nancy Zimmerspitz, his wife, on their own behalf and as guardians of their minor child, Rochelle Zimmerspitz; Thomas J. Hassall and Marie Hassall, his wife, on their own behalf and as guardians of their minor child, Patricia Anne; Daniel F. X. Powell and Anna T. Powell, his wife, on their own behalf and as guardians of their minor children, Kathleen A. and Daniel F. X., Jr.; Seth W. Watson, Jr. and Anne P. Watson, his wife, on their own behalf and as guardians of their minor child, Ellen P.,

Intervening Parties, Defendants.

THREE JUDGE COURT.

RELEVANT DOCKET ENTRIES.

1 Feb. 7, 1973. Complaint filed.

5 Feb. 21, 1973. Motion of Jose Diaz, et al to Intervene as Parties Deft., filed.

6 Feb. 27, 1973. Answer filed.

7 Apr. 16, 1973. Order SEITZ, Ch. J., 3rd Judicial Circuit, designating Hon. John J. Gibbons, U. S. Circuit Judge, and the Hon. A. Leon Higginbotham, Jr. U. S. District Judge, to sit with the Hon. Louis C. Bechtle, U. S. District Judge as members of the Court for the hearing and determination of the above captioned matter, filed. (4-17-73 entered and copies mailed)

8 Apr. 26, 1973. Plffs. motion for temporary restraining order, filed.

9 Apr 26, 1973. Plffs. motion for preliminary injunction and affidavit, filed.

11 May 17, 1973. HEARING sur Motion for Temporary Restraining Order—DENIED. Final Pretrial Order No. 1 is deemed to govern the progress of this case.

11 May 17, 1973. Order dtd 5/17/73 that the Motion of Jose Diaz, et al to Intervene as parties deft is GRANTED; further Ordered that the Motion to Intervene by Pa. Association for Independent Schools, reported by counsel to be in the process of filing, when filed, will be deemed GRANTED, filed.

12 May 21, 1973. Motion of intervener defts to dismiss the complaint, filed.

13 May 23, 1973. Order that motion of intervener defs, Jose Diaz et al, to dismiss the complaint is DENIED filed 5/24/73 entered and copies mailed. Motion of John P. Chesick et al to intervene as parties deft, filed.

16 June 4, 1973. Answer of Intervener defts, Jose Diaz, et al, filed.

20 June 5, 1973. Motion to dismiss, of Intervenor-defts Chesick, et al, memorandum in support of motion, & notice, filed.

21 June 5, 1973. Motion of Intervenor-defts Chesick, et al under FRCP 12 to strike paragraph 8 of plff's complaint, Brief in support of motion to strike paragraph 8 & Notice, filed.

33 Jul. 3, 1973. Order, BECHTLE, J., that hearing scheduled for 6/18/73 is contd. to 9/19/73; all compliance dates are extended 60 days and fixing pre-trial for 9/5/73 at 4:00 p.m., etc., filed. Entered & copies mailed 7/5/73.

34 Aug. 2, 1973. Plff's. interrogatories to John C. Pittinger and Grace M. Sloan, filed.

37 Sep. 10, 1973. Joint final pre-trial order, filed.

Sep. 10, 1973. Hearing sur: Plff's. motion for preliminary injunction.

Sep. 10, 1973. Witnesses sworn.

Sep. 13, 1973. Hearing resumes—Plff's. moves to amend complaint—written motion and briefs to be filed—motion to dismiss withdrawn—C. A. V.

44 Sep. 28, 1973. Defts'. request for findings of fact and conclusions of law of Commonwealth of Pa. and Jose Diaz, et al, filed.

45 Feb. 11, 1974. Opinion, GIBBONS, CJ and BECHTLE, J., that plffs'. application for prelim. and final inj. against expenditure of Commonwealth funds pursuant to Act 194 will be DENIED and plffs'. application for a prelim. and final inj. against expenditure of Commonwealth funds pursuant to Act 195 will be GRANTED, etc., filed. entr. & ntcs mailed 2/12/74.

46 Feb. 11, 1974. Opinion, HIGGINBOTHAM, J., concurring in part and DISSENTING in part with opinion of GIBBONS, CJ and BECHTLE, J., filed. entr. & notice mailed 2/12/74.

47 Mar. 7, 1974. Order, Gibbons, C. J. and Bechtle J., that plff's. application for preliminary and final injunction pursuant to Acts 194 & 195 are DENIED; defts. are preliminarily and finally enjoined from expending Commonwealth Funds pursuant to Act 195, etc., Commonwealth of Penna., et al are directed to file within 30 days an amendment to "Guidelines for the Administration of Acts 194 & 195" with Order Higginbotham, J., that he concurs with order only to the extent where relief as granted or denied is consistent, etc., filed. entr. & cys. mailed 3/8/74.

48 Mar. 21, 1974. Notice of appeal to Supreme Court of the United States, filed.

49 Apr. 12, 1974. Revisions to Guidelines for Administration of Acts 194 & 195, filed.

May 20, 1974. Record transmitted to U. S. Supreme Court.

COMPLAINT.

I. *Statement as to Jurisdiction.*

1. This is a civil action brought by the plaintiffs, on their own behalf and on behalf of all others similarly situated, for a temporary and permanent injunction against the allocation and use of the funds of the Commonwealth of Pennsylvania to finance the operations of schools owned and controlled by religious organizations and organized for and engaged in the practice, propagation and teaching of religion, and to declare such use violative of the First and Fourteenth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 28, United States Code, Sections 1331, 1343(3), 2281, 2283, 2201 and 2202.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand Dollars ($10,000) as more fully appears hereinafter.

4. Each of the individual plaintiffs is a citizen of the United States. Each resides in the State of Pennsylvania, and in the Eastern District of Pennsylvania. Each of them pays various taxes in and to the Commonwealth of Pennsylvania. One or more of the plaintiffs have purchased and continues to purchase cigarettes in the Commonwealth of Pennsylvania and has paid the Pennsylvania Cigarette Tax thereon. Plaintiff, Sylvia Meek, has a child regularly registered in and attending public school in Pennsylvania.

5. The American Civil Liberties Union, the National Association for the Advancement of Colored People, the Pennsylvania Jewish Community Relations Council and Americans United for Separation of Church and State are organizations which are interested in maintaining the

separation of church and state and which have members who are citizens and taxpayers of the Commonwealth of Pennsylvania.

6. Defendant John C. Pittinger is Secretary of Education of the Commonwealth of Pennsylvania and is sued herein in that capacity. Defendant Grace M. Sloan is the Treasurer of the Commonwealth of Pennsylvania and is sued herein in that capacity.

II. *Factual Allegations.*

7. (a) On July 12, 1972, the Governor of Pennsylvania signed into law Act No. 194 providing for the payment to nonpublic schools of tax-raised funds to pay for auxiliary services provided in such schools. (The text of Act No. 194 is set forth herein as Appendix A.)

(b) On July 12, 1972, the Governor of Pennsylvania signed into law Act No. 195 providing for the purchase with tax-raised funds of textbooks, instructional equipment and instructional materials to be loaned to and used in nonpublic schools. (The text of Act No. 195 is set forth herein as Appendix B.)

(c) On September 22, 1972, the Governor of Pennsylvania signed into law Act No. 204 appropriating Commonwealth funds to the Pennsylvania Parent Assistance Authority to be used to reimburse parents for tuition paid by them to nonpublic schools. (The text of Act No. 204 is set forth herein as Appendix C.)

8. Each of the Acts on its face and as construed and applied by the defendants authorizes and directs payments to or use of books, materials and equipment in schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct

their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

9. It is against the religious conscience of each of the plaintiffs to be forced by the operation of the taxing power to contribute to the propagation of religion in general and to religions to which he does not adhere in particular, or for the support or maintenance of sectarian schools or places of worship.

10. The First Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *."

III. *Causes of Action*

11. *First Count:* Each of the Acts on its face and as construed and applied by the defendants is a law respecting an establishment of religion in violation of the First Amendment of the United States Constitution in that it (a) constitutes governmental financing and subsidizing of schools which are controlled by religious bodies, organized for and engaged in the practice, propagation and teaching of religion, and of schools limiting or giving preference in, admission and employment to persons of particular religious faiths; (b) constitutes governmental action whose

purpose and primary effect is to advance religion; (c) gives rise to an excessive governmental involvement in and entanglement with religion; and (d) gives rise to and intensifies political fragmentation and divisiveness along religious lines.

12. *Second Count:* Each of the Acts on its face and as construed and applied by the defendants, violates the First Amendment to the United States Constitution in that it prohibits the free exercise of religion on the part of the plaintiffs by reason of the fact that it constitutes compulsory taxation for the support of religion or religious schools.

IV. *Other Allegations.*

13. This suit involves a genuine case of controversy between the plaintiffs and defendants.

14. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

V. *Prayers for Relief.*

15. The plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2281 and 2283 of the United States Code to declare unconstitutional and enjoin the enforcement of each of the Acts, as hereinbefore set forth.

(2) That the defendants and each of them be enjoined from approving or paying any funds of the Commonwealth of Pennsylvania pursuant to the aforesaid Acts or from otherwise enforcing or administering said Acts.

(3) That a preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants for the relief sought herein.

(4) That the plaintiffs be granted such other and further relief as the Court may deem just and proper.

William P. Thorn,
William P. Thorn,
Leo Pfeffer,
Leo Pfeffer,
Attorneys for Plaintiffs.

Appendix "A".

Act 194
Approved 7-12-72 Printer's No. 2846

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2151 Session of 1972

INTRODUCED BY MESSRS. GALLAGHER, M. P. MULLEN, SCANLON, BELLOMINI, BERKES, IRVIS, DOMBROWSKI, MALADY, PRENDERGAST, ENGLEHART, HOMER, KESTER, FEE, RENWICK, DOYLE, O'DONNELL, YAHNER, MURTHA, COMER, MEBUS, FOX, BRUNNER, LEDERER, RIEGER, RUSH, SCHMITT, WRIGHT, JONES, RUANE, DORSEY, MCMONAGLE, EARLY, RUGGIERO, R. K. HAMILTON, GEISLER, MYERS, NEEDHAM, BUTERA, CROWLEY, KATZ, J. H. HAMILTON, COPPOLINO, MASTRANGELO, BONETTO, NOVAK, RAPPAPORT, HALVERSON, CAPUTO, BURKARDT, KNEPPER, MRS. GILETTE, MESSRS. RYBAK, PIEVSKY, MRS. KELLY, MRS. ANDERSON, MESSRS. MUSTO, M. M. MULLEN, LUTTY, GLEASON, MILLER, KLUNK, KLEPPER, FRANK J. LYNCH, GOODMAN, BIXLER and SCIRICA, MAY 10, 1972

REFERRED TO COMMITTEE ON EDUCATION, MAY 10, 1972

AN ACT

1 Amending the act of March 10, 1949 (P. L. 30), entitled
"An act

2 relating to the public school system, including
certain
3 provisions applicable as well to private and paro-
chial
4 schools; amending, revising, consolidating and
changing the
5 laws relating thereto," providing for auxiliary
services for
6 the benefit of children attending nonpublic schools
in the
7 Commonwealth.
8 The General Assembly of the Commonwealth of
Pennsylvania
9 hereby enacts as follows:
10 Section 1. The act of March 10, 1949 (P. L. 30),
known as the
11 "Public School Code of 1949," is amended by adding a
section to
12 read:
13 *Section 922-A. Auxiliary Services; Nonpublic*
School
14 *Children.—(a) Legislative Finding; Declaration of*
Policy. The
15 *welfare of the Commonwealth requires that the present*
and future
16 *generations of school age children be assured ample*
opportunity

1 *to develop to the fullest their intellectual capacities. To*

further this objective, the Commonwealth provides, through tax

funds of the Commonwealth, auxiliary services free of charge to

children attending public schools within the Commonwealth.

Approximately one quarter of all children in the Commonwealth,

in compliance with the compulsory attendance provisions of this

act, attend nonpublic schools. Although their parents are

taxpayers of the Commonwealth, these children do not receive

auxiliary services from the Commonwealth. It is the intent of

the General Assembly by this enactment to assure the providing

of such auxiliary services in such a manner that every school

child in the Commonwealth will equitably share in the benefits

thereof.

(b) Definitions. The following terms, whenever used or

referred to in this section, shall have the following meanings,

except in those circumstances where the context clearly

indicates otherwise:

"Nonpublic school" means any school, other than a public

school within the Commonwealth of Pennsylvania, wherein a

resident of the Commonwealth may legally fulfill the compulsory

school attendance requirements of this act and which meet the

requirements of Title VI of the Civil Rights Act of 1964 (Public

Law 88-352).

"Auxiliary services" means guidance, counseling and testing

services; psychological services; services for exceptional

children; remedial and therapeutic services; speech and hearing

services; services for the improvement of the educationally

disadvantaged (such as, but not limited to, teaching English as

a second language), and such other secular, neutral,

non-ideological services as are of benefit to nonpublic school

—2—

children and are presently or hereafter provided for public

school children of the Commonwealth.

(c) Provision of Services. Pursuant to rules and regulations

established by the secretary, each intermediate unit shall

provide auxiliary services to all children who are enrolled in

grades kindergarten through twelve in nonpublic schools wherein

the requirements of the compulsory attendance provisions of this

act may be met and which are located within the area served by

the intermediate unit, such auxiliary services to be provided in

their respective schools. The secretary shall each year

apportion to each intermediate unit an amount equal to the cost

of providing such services but in no case shall the amount

apportioned be in excess of thirty dollars ($30) per pupil

enrolled in nonpublic schools within the area served by the

intermediate unit.

Section 2. If a part of this act is invalid, all valid parts

that are severable from the invalid part remain in effect. If a

part of this act is invalid, in one or more of its applications,

the part remains in effect in all valid applications that are

severable from the invalid applications.

Section 3. This act shall take effect immediately.

Appendix "B".

Act 195

Approved 7-12-72 Printer's No. 2847

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2152 Session of 1972

INTRODUCED BY MESSRS. M. P. MULLEN, GALLAGHER, BELLOMINI, SCANLON, BERKES, DOMBROWSKI, MALADY, PRENDERGAST, ENGLEHART, HOMER, KESTER, FEE, RENWICK, DOYLE, O'DONNELL, YAHNER, MURTHA, COMER, MEBUS, FOX, BRUNNER, LEDERER, RIEGER, RUSH, SCHMITT, WRIGHT, JONES, RUANE, R. K. HAMILTON, GEISLER, MYERS, NEEDHAM, BUTERA, CROWLEY, KATZ, J. H. HAMILTON, COPPOLINO, MASTRANGELO, BONETTO, NOVAK, HALVERSON, KNEPPER, MRS. ANDERSON, MESSRS. PIEVSKY, PERRY, FRANK LYNCH, EARLY, KLUNK, MRS. KELLY, MESSRS. RAPPAPORT, GLEASON, MOORE, GOODMAN, SCIRICA, CAPUTO, BURKARDT, RYBAK, RUGGIERO, MUSTO, MEHOLCHICK, MRS. GILLETTE, MESSRS. MILLER AND DORSEY, MAY 10, 1972

REFERRED TO COMMITTEE ON EDUCATION, MAY 10, 1972

AN ACT

1 Amending the act of March 10, 1949 (P. L. 30), entitled
"An act

2 relating to the public school system, including certain
3 provisions applicable as well to private and parochial
4 schools; amending, revising consolidating and changing the
5 laws relating thereto," providing for the loan of textbooks
6 and the furnishing of materials and equipment for the benefit
7 of children attending nonpublic schools in the Commonwealth.
8 The General Assembly of the Commonwealth of Pennsylvania
9 hereby enacts as follows:
10 Section 1. The act of March 10, 1949, known as the "Public
11 School Code of 1949," is amended by adding a section to read:
12 *Section 922-A. Loan of Textbooks, Instructional Materials*
13 *and Equipment, Nonpublic School Children.—(a) Legislative*
14 *Findings; Declaration of Policy. The welfare of the Commonwealth*
15 *requires that the present and future generations of school age*
16 *children be assured ample opportunity to develop to the fullest*

their intellectual capacities. To further this objective, the
Commonwealth provides, through tax funds of the Commonwealth,
textbooks and instructional materials free of charge to children
attending public schools within the Commonwealth. Approximately
one quarter of all children in the Commonwealth, in compliance
with the compulsory attendance provisions of this act, attend
nonpublic schools. Although their parents are taxpayers of the
Commonwealth, these children do not receive textbooks or
instructional materials from the Commonwealth. It is the intent
of the General Assembly by this enactment to assure such a
distribution of such educational aids that every school child in
the Commonwealth will equitably share in the benefits thereof.

(b) Definitions. The following terms, whenever used or
referred to in this section, shall have the following meanings,
except in those circumstances where the context clearly
indicates otherwise:

"Instructional equipment" means instructional equipment,
other than fixtures annexed to and forming part of the real
estate, which is suitable for and to be used by children and/or
teachers. The term includes but is not limited to projection
equipment, recording equipment, laboratory equipment, and any
other educational secular, neutral, non-ideological equipment as
may be of benefit to the instruction of nonpublic school
children and are presently or hereafter provided for public
school children of the Commonwealth.

"Instructional materials" means books, periodicals,
documents, pamphlets, photographs, reproductions, pictorial or
graphic works, musical scores, maps, charts, globes, sound
recordings, including but not limited to those on discs and
tapes, processed slides, transparencies, films, filmstrips,

—2—

kinescopes, and video tapes, or any other printed and published

materials of a similar nature made by any method now developed or hereafter to be developed. The term includes such other secular, neutral, non-ideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

"Nonpublic school" means any school, other than a public school within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of this act and which meet the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

"Textbooks" means books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group. Such textbooks shall be textbooks which are acceptable for use in any public, elementary, or secondary school of the Commonwealth.

(c) Loan of Textbooks. The Secretary of Education directly, or through the intermediate units, shall have the power and duty to purchase textbooks and, upon individual request, to loan them to all children residing in the Commonwealth who are enrolled in grades kindergarten through twelve of a nonpublic school wherein the requirements of the compulsory attendance provisions of this act may be met. Such textbooks shall be loaned free to such children subject to such rules and regulations as may be prescribed by the Secretary of Education.

(d) Purchase of Books. The Secretary shall not be required

to purchase or otherwise acquire textbooks, pursuant to this section, the total cost of which, in any school year, shall

exceed an amount equal to ten dollars ($10) multiplied by the
number of children residing in the Commonwealth who on the first
day of October of such school year are enrolled in grades
kindergarten through twelve of a nonpublic school within the
Commonwealth in which the requirements of the compulsory
attendance provisions of this act may be met.

(e) Purchase of Instructional Materials and Equipment.

Pursuant to requests from the appropriate nonpublic school
official on behalf of nonpublic school pupils, the Secretary of
Education shall have the power and duty to purchase directly, or
through the intermediate units, or otherwise acquire, and to
loan to such nonpublic schools, instructional materials and
equipment, useful to the education of such children, the total
cost of which, in any school year, shall be an amount equal to
but not more than twenty-five dollars ($25) multiplied by the
number of children residing in the Commonwealth who on the first

day of October of such school year, are enrolled in grades
kindergarten through twelve of a nonpublic school in which the
requirements of the compulsory attendance provisions of this act
may be met.

Section 2. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 3. This act shall take effect immediately.

Appendix "C".

Act 204

Approved 9-22-72

Senate Amended

Prior Printer's No. 2845 Printer's No. 3156

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2150 Session of 1972

INTRODUCED BY MESSRS. M. P. MULLEN, GALLAGHER, SCANLON, BELLOMINI, BERKES, DOMBROWSKI, MALADY, PRENDERGAST, ENGLEHART, HOMER, KESTER, FEE, RENWICK, DOYLE, O'DONNELL, YAHNER, MURTHA, COMER, MEBUS, FOX, BRUNNER, LEDERER, RIEGER, RUSH, SCHMITT, WRIGHT, R. K. HAMILTON, GEISLER, MYERS, NEEDHAM, BUTERA, CROWLEY, KATZ, J. H. HAMILTON, COPPOLINO, MASTRANGELO, BONETTO, NOVAK, IRVIS, RAPPAPORT, CAPUTO, SCIRICA, PIEVSKY, EARLY, RYBAK, RUGGIERO, HALVERSON, FRANK J. LYNCH, GLEASON, MRS. GILLETTE, MRS. KELLY, MESSRS. JONES, BURKARDT, DORSEY, KLUNK, MCMONAGLE, LUTTY, PERRY, PEZAK AND MRS. ANDERSON, MAY 10, 1972

SENATOR MESSINGER, EDUCATION, IN SENATE, AS AMENDED, JUNE 20, 1972

AN ACT

1 Amending the act of August 27, 1971 (Act No. 92), entitled "An

2 act creating an authority for the purpose of avoiding

3 increased costs of public education by providing partial

4 reimbursement for nonpublic education and defining its powers

5 and duties," further providing for the Parent Reimbursement

6 Fund.

7 The General Assembly of the Commonwealth of Pennsylvania

8 hereby enacts as follows:

9 Section 1. Section 5, act of August 27, 1971 (Act No. 92),

10 known as the "Parent Reimbursement Act for Nonpublic Education,"

11 is amended to read:

12 Section 5. Parent Reimbursement Fund.—There is hereby

13 created for the special purpose of this act, a Parent

14 Reimbursement Fund. Beginning July 1, 1971, twenty-three per

15 cent, *and beginning July 1, 1972, ~~five~~ TEN per cent,* of the tax ←

—1—

1 revenue collected by the Department of Revenue, pursuant to the

2 act of July 22, 1970 (P. L. 513), known as the "Pennsylvania

Cigarette Tax Act," shall be paid into the State Treasury to the credit of the Parent Reimbursement Fund.

Moneys in the Parent Reimbursement Fund are hereby appropriated to the Pennsylvania Parent Assistance Authority, to be used solely for the purposes of this Act.

All expenses incurred in connection with the administration of this act shall be paid solely out of the Parent Reimbursement Fund.

Section 2. This Act shall take effect immediately.

ANSWER.

Defendants John C. Pittenger, Secretary of Education of the Commonwealth of Pennsylvania, and Grace M. Sloan, Treasurer of the Commonwealth of Pennsylvania, by their attorneys, answer to the Complaint herein as follows:

FIRST DEFENSE.

1. Denied. Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the Complaint.

2. Denied except that Defendants admit that this action purports to be brought pursuant to Title 28 United States Code, Sections 1331, 1343(3), 2281, 2283, 2201 and 2202.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Denied. The acts which are legislation of the Commonwealth of Pennsylvania speak for themselves.

8. Denied. Defendants deny that plaintiffs have correctly summarized and characterized the acts. Defendants specifically deny that any of the acts direct payments to nonpublic church-related schools.

9. Denied. Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 9 of the Complaint.

10. Admitted.

11. Denied. Defendants are advised by counsel that the allegations of paragraph 11 of the Complaint are conclusions of law which require no response.

12. Denied. Defendants are advised by counsel that the allegations of paragraph 12 of the Complaint are conclusions of law which require no response.

13. Defendants deny the allegation of paragraph 13 except that defendants admit that there is a genuine case and controversy with respect to those allegations of the Complaint which concern Act 194 of 1972 and Act 195 of 1972.

14. Denied. Defendants are advised by counsel that the allegations of paragraph 14 of the Complaint are conclusions of law which require no response.

SECOND DEFENSE.

The Complaint fails to state a claim against defendants upon which relief can be granted.

WHEREFORE, defendants demand judgments dismissing the Complaint, together with costs and disbursements in this action and such other relief as may be just and proper.

ISRAEL PACKEL,
Attorney General,
J. JUSTIN BLEWITT, JR.,
J. Justin Blewitt, Jr.,
Deputy Attorney General,
Attorneys for Defendants.

State Capitol Annex Bldg.,
Harrisburg, Pa.
717-787-3445

ANSWER OF INTERVENER DEFENDANTS, JOSE DIAZ, ET AL.

1. Denied as to averments of a class action. It is denied that the organizational Plaintiffs have standing to bring this action on their own behalf. It is denied that there exists any allocation or use of funds of the Commonwealth of Pennsylvania to finance the operations of religiously-affiliated schools.

2. It is denied that jurisdiction is conferred upon this Court with respect to the claims of the organizational Plaintiffs. With respect to the claims of the individual Plaintiffs, it is denied that they are denied the free exercise of religion. It is admitted that this action purports to be brought pursuant to Title 28 United States Code, Sections 1331, 1343(3), 2281, 2283, 2201 and 2202.

3. Admitted.

4. Denied. Intervener Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 4 of the Complaint.

5. Admitted, but the organizational Plaintiffs do not have standing to bring this action.

6. Admitted.

7. (a) denied. Intervener Defendants admit that on July 12, 1972, the Governor signed into law Act 194. Intervener Defendants further admit that "Appendix a" is a true and correct copy of this Act. Intervener Defendants deny that Act 194 provides for the payment to nonpublic schools of any tax-raised funds. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

(b) denied. Intervener Defendants admit that on July 12, 1972 the Governor signed into law Act 195. Intervener Defendants further admit that "Appendix B" is a true and correct copy of this Act. Intervener Defendants deny that Plaintiffs have correctly stated the text of this Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

8. Denied as to each and every averment.

9. Denied with respect to the organizational Plaintiffs. As to the individual Plaintiffs, Intervener Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9.

10. Admitted.

11. Denied. Intervener Defendants are advised by counsel that the allegations of Paragraph 11 are conclusions of law which require no response.

12. Denied. Intervener Defendants are advised by counsel that the allegations of Paragraph 12 are conclusions of law which require no response.

13. Denied as to the organizational Plaintiffs who lack standing to bring this action. Denied as to the individual Plaintiffs who lack standing to bring this action with respect to their claim that they are denied the free exercise of religion.

14. Denied as false in fact and law.

FIRST DEFENSE.

15. The Complaint (a) fails to state a claim with respect to facial constitutionality of the Acts upon which relief can be granted and (b) fails to state a claim with respect to constitutionality of the Acts as applied upon which relief can be granted.

SECOND DEFENSE.

16. The organizational Plaintiffs have no standing to bring this action. The individual Plaintiffs have no standing to bring this action with respect to the Free Exercise Clause.

THIRD DEFENSE.

17. Intervener Defendants, Seth W. Watson, Jr. and Anne P. Watson, his wife, are parents of Ellen P. Watson, who is enrolled in a nonpublic school, as defined in the Act, which is non-church-related.

18. Intervener Defendants, Jose Diaz and Enilda Diaz, William Zimmerspitz and Nancy Zimmerspitz, Thomas J. Hassal and Marie Hassal, and Daniel F. X. Powell and Anna T. Powell, are parents of children who are enrolled in nonpublic schools, as defined in the Act, which are church-related.

19. With respect to the Intervener Defendants named in paragraph 17 above, the Complaint fails to state a claim under the Establishment Clause upon which relief can be granted.

20. With respect to the Intervener Defendants named in paragraph 18 above, the Complaint fails to state a claim under the Establishment Clause upon which relief can be granted.

FOURTH DEFENSE.

21. Intervener Defendants incorporate by reference the allegations of paragraph 17 and 18.

22. The Act provides public welfare benefits to all children of these parents in the form of the payments thereunder.

23. To deny to these children the benefits of the Act, solely because they attend nonpublic schools, would constitute a denial to them of the Equal Protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

FIFTH DEFENSE.

24. Intervener Defendants incorporate by reference the allegations of paragraphs 17 and 18.

25. The Act provides public welfare benefits to all children of these parents in the form of the payments thereunder.

26. To deny to the children of the parents named in paragraph 18 above, the benefits of the Act, solely because they exercise their constitutional right to attend church-related schools under the Compulsory Attendance Laws of the Commonwealth of Pennsylvania, would constitute a denial to them of the equal protection of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

SIXTH DEFENSE.

27. As to Plaintiffs' prayer for a preliminary injunction: the Plaintiffs will suffer no irreparable injury if a preliminary injunction is not granted.

28. The granting of a preliminary injunction will cause irreparable injury to the children of Intervener Defendants and to all children similarly situated.

29. The Plaintiffs are guilty of laches herein, requiring denial of any interlocutory relief.

WHEREFORE, Intervener Defendants pray the Court to dismiss the Complaint and enter judgment in favor of all Defendants, with costs.

Of Counsel:
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Herbert G. Keene, Jr.,

C. CLARK HODGSON, JR.,
C. Clark Hodgson, Jr.,

Attorneys for Intervener Defendants, Jose Diaz, et al.

HEARING RE
APPLICATION FOR PRELIMINARY INJUNCTION.

Philadelphia, Pa., September 10, 1973.

Before HON. JOHN J. GIBBONS, JR., *Circuit Judge,* HON. A. LEON HIGGINBOTHAM, JR., *J.,* and HON. LOUIS C. BECHTLE, *J.*

PRESENT:

WOLF, BLOCK, SCHORR and SOLIS-COHEN
by WILLIAM P. THORN, ESQ.,
and
LEO PFEFFER, ESQ.,
for the Plaintiffs.

J. JUSTIN BLEWITT, JR., ESQ.,
Deputy Attorney General,
for the defendant.

BALL & SKELLY,
(Harrisburg, Pa.),
by WILLIAM B. BALL, ESQ.,
JOSEPH SKELLY, ESQ.,
and
STRADLEY, RONAN, STEVENS & YOUNG,
by C. CLARK HODGSON, JR., ESQ.,
for Intervenors.

DUANE, MORRIS & HECKSCHER,
by HENRY T. REATH, ESQ.,
and
JANE ELLIOTT, ESQ.,
for Intervenors Powell, Watson and Pennsylvania Association for Independent Schools.

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[2]

Judge Gibbons: Plaintiffs' interrogatories filed August 2nd?

Mr. Thorn: I have two more copies if that will be helpful.

If the court please, I would like to offer the affidavits of the individual plaintiffs to the effect that the statutes involved violate their religious conscience by forcing them to support religions with which they do not agree.

Mr. Blewitt: If the court please, we object to the introduction of the affidavits. In the first place, the affidavits don't even state that these acts violate their religious beliefs, and in the second place, if witnesses are available, I think they should be subject to cross-examination.

Judge Gibbons: Objection sustained.

Mr. Thorn: In that case, then, I will call Sylvia Meek as the plaintiffs' first witness.

SYLVIA MEEK, affirmed.

DIRECT EXAMINATION.

By Mr. Thorn:

Q. Mrs. Meek, you are one of the plaintiffs in this action, are you?

A. That's correct.

Q. What is your residence?

A. I live at 7147 Boyer Street which is in Philadelphia.

[3]

Q. And, Mrs. Meek, are you a citizen of the United States?

A. Yes, I am.

Q. And are you a resident domiciled in Pennsylvania?

A. Yes, I am.

Q. Are you a taxpayer in the State of Pennsylvania?

A. Yes, I am.

Q. Now, Mrs. Meek, you are familiar with Acts No. 194 and 195 of 1972 adopted by the Legislature of the Commonwealth of Pennsylvania, approved by the Governor?

A. Yes, I am fully familiar with those Acts.

Q. And you are aware of their contents?

A. I am. I am aware of their contents.

Q. Mrs. Meek, what is your religious heritage?

A. I am of Jewish heritage.

Q. With respect to these Acts, will you tell the court what your religious beliefs are with respect to them?

A. As far as these Acts are concerned, I find that they violate my religious conscience because I firmly believe that the First Amendment does protect me in that there shall not be an establishment of any religion and there shall not be the prohibition of the free exercise of any religion.

These bills as far as I am concerned violate—extend aid to religious schools, and I feel that they affect me because as a taxpayer this money will be aiding either religion in general or a particular religion and as such it violates my

[4]

conscience.

Mr. Thorn: I have no further questions.

Judge Gibbons: Any cross-examination?

Mr. Blewitt: If the court please, I would like to reverse if possible the order of cross-examination since the Commonwealth feels that these Acts are primarily for the benefit of children and defer to the intervenors representing the parents and have the Commonwealth cross-examine last.

Mr. Thorn: No objection.

CROSS-EXAMINATION.

By Mr. Ball:

Q. Mrs. Meek, you stated in answer to a question as to what your religion was that you are of the Jewish heritage. Are you a practitioner of the Jewish faith, Mrs. Meek?

A. I do not practice any religion, sir.

Q. Thank you. Therefore, my next question was to have been what specific teaching of your religion these Acts run contrary to? What specific teaching of the Jewish heritage do these Acts run contrary to?

A. I would like to answer it in this way: I do not believe that the Acts have to run contrary to any one specific religion. If I were an atheist, they would, too, be objectionable to me. Therefore, what is relevant is that these Acts do aid religion and I believe that is the issue in the case at hand.

Q. These Acts, then, they do not prevent or impede you in

[5]

prayer according to your religious faith?

A. Me as an individual?

Q. Yes.

A. No.

Q. They don't impede you in carrying out any belief, religious belief which you have?

A. Perhaps they do. If these Acts give aid to religious schools, they in essence hurt me in terms of what I believe inasfar as my religious conscience is concerned.

Q. Now, Mrs. Meek, you signed a complaint in which you say in Paragraph 14 of it that you personally—and I am quoting now from what you have said in your complaint "Will suffer irreparable injury unless a preliminary and permanent injunction is granted." Now, in what way will you personally suffer injury if an injunction is not granted in this case?

Mr. Thorn: If the court please, I am going to object to that. That's a legal question and calls for a legal conclusion. The Supreme Court has held this: A violation of the First Amendment is an irreparable injury.

Judge Gibbons: Objection overruled. This is a non-jury case and I am going to allow a fair amount of latitude.

A. Well, my lawyer answered it very well. However, I shall put it in my own words, and that is that, of course, it violates my conscience and therefore as a taxpayer it does irreparable harm to me. The First Amendment is supposed to protect me personally,

[6]

me as an individual.

By Mr. Ball:

Q. Yes. It will not, then, result in any loss of income to you?

A. Oh, I don't know. If we talk about income in terms of actual cash in hand that I receive, as far as employment is concerned, that's one thing. If we talk about income in its total in terms of where my taxpayer money goes, that's another thing.

By the way, I think you ought to know that I have had children, five children in the public schools of Philadelphia, one of whom is still in the public schools of Philadelphia. The others have graduated.

Q. And these Acts, then, would they cause you any loss of property except in the sense that you say that you would have a tax contribution you would have to make under them? Otherwise, any loss of property or income?

A. We could have a discussion on that if we wanted to in terms of property and property that's involved in terms of funds for public schools and the fact that this money is going outside.

Q. I mean the loss of your personal property?

A. All right, but that's part of me. No, it does not extend to my house, no.

Mr. Ball: I think that will be all, Your Honor.

Judge Gibbons: Mr. Reath?

Mr. Reath: I have no questions, Your Honor.

Judge Gibbons: Mr. Blewitt?

[7]

Mr. Blewitt: Just one or two questions, Your Honor.

By Mr. Blewitt:

Q. If the court should find that this Act is constitutional, Mrs. Meek, so that the Act would remain in effect, will you still feel that this Act injures you?

A. Yes.

Q. So then I take it that if the court should decide that the Act is constitutional it would be irrelevant as far as you

are concerned, that decision would be irrelevant as far as you are concerned?

A. Of course not. Any decision that the court holds is relevant. How could it be irrelevant?

Q. However, if the Act should be found constitutional——

A. If the Act——

Q. —you will still feel that it injures you?

A. Yes.

Mr. Blewitt: I have no further questions.

Mr. Thorn: No further questions, Your Honor.

Mr. Reath: If your Honor please, at this time I move to strike the testimony of Mrs. Meek as not being constitutionally valid on the free exercise issue.

Judge Gibbons: We will consider that motion in connection with our ruling.

Call your next witness.

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[8]

Mr. Thorn: If the court please, I have one other individual plaintiff here. Perhaps counsel would stipulate that if called he would testify to the same effect that Mrs. Meek did.

Mr. Ball: Yes, I will be happy to stipulate to that.

Mr. Thorn: Mr. Blewitt?

Mr. Blewitt: I will stipulate.

Mr. Thorn: Mr. Reath, would you stipulate?

Mr. Reath: Yes.

Judge Gibbons: And who is this additional witness?

Mr. Thorn: Charles A. Weatherly.

Judge Gibbons: The parties have stipulated that Charles A. Weatherly, if he were called, would testify to the same effect as Sylvia Meek.

Mr. Thorn: Now, if the court please, that's the only testimony which we wish to introduce in this particular hearing.

We do wish to make argument, and Mr. Pfeffer will make that argument. I don't know whether you want to hear it now or at the conclusion of all the testimony.

Mr. Pfeffer: If Your Honor please, before we do that, there is one further concession which we would like the defendants to stipulate. We did it in chambers but apparently we couldn't get it in a written stipulation.

Paragraph 8 of our complaint states that:

[9]

"Each of the Acts on its face and as construed and applied by the defendants authorizes and directs payments to or use of books, materials and equipment in schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith"—

I will not at this point go through the rest, but what we ask is a concession which as I say was made in chambers that under the Acts, whenever they use the terms "school" "private school" or "non-public school," it includes and does not disqualify the school or those attending that school by reason of the fact that the school is controlled by a church or religious organization if the school has as its purpose the teach-

ing, propagation and promotion of a particular religious faith and so on as alleged in Paragraph 8. We have practically received that, but not quite, in the answers to interrogatories in which the Commonwealth states that it doesn't ask the schools that question, it doesn't consider that in determining the application of the Act. We would just like to have that on the record, that as far as the defense is concerned, these factors do not disqualify a school or the students thereof under the terms of this Act.

Judge Gibbons: Mr. Blewitt?

Mr. Blewitt: We will defer to Mr. Ball.

Judge Gibbons: Mr. Ball?

Mr. Ball: Your Honor, we think the Act speaks for

[10]

itself. The Act defines a non-public school as any school in which the compusory school attendance requirements of the law may be fulfilled, so there is no question whatever in our minds that a child attending a religiously-affiliated school would be a beneficiary of the Act. To go on to attempt to say anything with respect to characteristics of particular schools I hardly think we can do without having each school there to go into it, but it is clear that religiously-affiliated schools are schools in which the benefits of these Acts can be obtained.

Judge Gibbons: Mr. Reath?

Mr. Reath: My position is the same. I think the Act speaks for itself and therefore I cannot accept Mr. Pfeffer's statement as a matter of law, although

I would say to the court that I think his characterization of the Act from the Act itself is proper.

Judge Gibbons: Can we say this, that the Act permits any student attending any school meeting the requirements of the compulsory school attendance law and that religious schools in Pennsylvania meet the requirements of that law?

Mr. Pfeffer: We will accept that as a portion but not complete, because we agree to that, but we also urge—as I say, the answers to interrogatories in fact say so—that a religious school which nevertheless is controlled by churches or religious organizations is deemed by the Commonwealth of Pennsylvania as a non-public school which is eligible and whose students are eligible

[11]

for the benefits of this Act.

Judge Gibbons: Mr. Pfeffer, I can't insist on counsel stipulating anything more than they are willing to stipulate and it seems to me that for your purpose you have an adequate stipulation.

Mr. Pfeffer: I don't think, Your Honor. We would like therefore to call the administrator of the Act for the Commonwealth as our witness.

Mr. Ball: We think what Mr. Pfeffer seeks is in the answers to the interrogatories. We think there is——

Judge Gibbons: If he is not satisfied with that, he is entitled to call a witness, and now is the time.

Mr. Thorn: Mr. Czekoski.

ROBERT J. CZEKOSKI, sworn.

DIRECT EXAMINATION.

By Mr. Pfeffer:

Q. Mr. Czekoski, what is your position now in respect to the statutes which are involved in this lawsuit?

A. I am the Coordinator of Non-Public School Services charged with the implementation of Acts 194 and 195.

Q. How long have you been in that position?

A. Just about one year now.

Q. I am sorry?

A. Just about one year.

[12]

Q. Just about one year?

Judge Bechtle: Speak loudly so we can all hear.

The Witness: Yes.

By Mr. Pfeffer:

Q. During the course of your administration of the Act, have you in any way held ineligible under the benefits of these Acts either a school or the pupils thereof by reason of the fact that the school is controlled by a church or a religious organization?

Mr. Blewitt: If the court please, I object to the question as being hypothetical in nature. There has been no establishment thus far that any of the participant schools are controlled by, in the language of Paragraph 8, a religious institution.

Judge Gibbons: I will permit the question.

Mr. Pfeffer: Pardon me?

Judge Gibbons: I will permit the question.

Judge Bechtle: The witness may answer.
You may answer.

A. In other words, I believe what the question is, if we declare ineligible any school that requested services or the loan of materials and equipment. This again we have not.

Judge Bechtle: Does this apply to students, too?

The Witness: We found no schools, for example, that requested services or requested materials or equipment or the loan of textbooks that did not fulfill the compulsory school

[13]

attendance requirements.

By Mr. Pfeffer:

Q. In your administration of this Act have you in any way indicated, in any way acted upon the premise, that a school which is controlled by a church or religious organization, that school or its students would not be qualified to receive the benefits of the Act if it were otherwise eligible?

A. I am sorry, but I don't understand that question.

Q. In your administration of the Act have you taken any action or made any announcement to the effect that a school or its students would not be eligible because it is controlled by a church or a religious organization?

Mr. Blewitt: I object to the question, Your Honor. "Controlled" is a determination Mr. Czekoski can only reach if he were a student of the religious organizations and the teaching purposes of the various religious groups in the State of Pennsylvania. There has been no expert foundation laid for the answer to that question.

Judge Gibbons: I will let him answer it if he is able to. I understand his testimony thus far is his own criterion for granting aid is that the school in question fulfills the requirements of the compulsory attendance law. I don't know whether he can answer your question or not, but we will permit it.

A. We use a list of schools which the Bureau, our Bureau of Statistics compiles, in which children are enrolled in these

[14]

non-public schools in Pennsylvania and then we have notified them of the two laws in question and sent them the necessary documents for participation if they so elect.

By Mr. Pfeffer:

Q. Does that list of schools or that communication bar schools which are controlled by churches or religious organizations in any way?

A. No, we send them to sectarian or non-sectarian schools.

Q. Now, does that list of schools or the instruction communications in any way bar schools or their students who have as their purpose teaching, propagation, promotion of a particular religious faith?

Mr. Blewitt: I must renew my objection to this series of questions.

Judge Gibbons: Overruled.

A. When we receive the list from the Bureau of Statistics, we don't know from that list whether or not a school happens to be sectarian or non-sectarian.

By Mr. Pfeffer:

Q. Well, I will ask the question again: Do your instructions or your administration of the Act bar a school or the

students thereof by reason of the fact that that school has as its purpose the teaching, propagation or promotion of a particular religious faith?

A. We do not get into whether or not a school—you know, what

[15]

kind of religious background, so I don't know how to answer that question.

Q. I think your answer, then, is—if I am correct—that you do not bar a school or the students thereof because the school has as its purpose the teaching, propagation and promotion of a particular religious faith.

A. Yes.

Judge Gibbons: Is that a question?

Mr. Pfeffer: I am asking if that's correct.

A. We do not bar students.

By Mr. Pfeffer:

Q. I am asking now whether in the same context you bar a school because it conducts operations, curriculums and programs to fulfill the purpose of teaching, propagation and promotion of a particular religious faith?

A. No, the only reason we would bar a school or the students enrolled in that school from participation is because they would not meet the compulsory school attendance requirements.

Q. But otherwise you would not bar them under my statement of the question?

A. No, we would not bar them for that reason.

Q. Subject to the same conditions solely, would you bar a school or its students because that particular school imposes religious restrictions on admissions?

A. I don't know of any schools that impose religious restrictions.

[16]

Q. May I ask you to answer the question: Would your administration bar such school if it were to apply religious restrictions on admissions as you understand the Act?

A. To my knowledge we would not make a decision on that basis.

Q. Do you make any inquiry in granting benefits under the Act as to whether or not that school imposes religious restrictions on admissions?

A. No, we do not make any inquiry.

Q. Why do you not make inquiry?

A. According to law, the law defines the non-public school as being other than a public school and the students enrolled in that school are legally fulfilling the compulsory school attendance requirements.

Q. Therefore, if the school does impose religious restrictions on admissions, it would have no relevance to your administration of the Act?

A. No.

Q. I ask the same questions with respect to schools that require attendance at instruction in theology and religious doctrine, the same question?

A. The same answer would hold true.

Q. I ask the same question with respect to whether or not a school requires attendance or participation in religious worship?

A. It would be the same answer.

Q. I ask the same question, whether a school is an integral part

[17]

of the religious mission of the sponsoring church?

A. The same answer.

Q. I ask the same question, which has as a substantial or dominant purpose the inculcation of religious values?

A. It would be the same answer.

Q. I ask the same question with respect to a school which imposes religious restrictions on faculty appointments?

A. The same answer.

Q. Finally I ask the same question with respect to a school which imposes religious restrictions on what the faculty may teach?

A. The same answer.

Mr. Pfeffer: I have no further questions.

Judge Gibbons: When you said "The same answer," do I understand correctly that you make no such inquiry?

The Witness: We make no such inquiry.

By Mr. Pfeffer:

Q. And interpret the act not to make that relevant?

Judge Gibbons: I will sustain the objection to that. The purpose of the Act calls for a legal conclusion.

Mr. Pfeffer: Your Honor, he had already testified to that effect. I am repeating his testimony. He testified to that effect earlier that in the administration of the Act, he does not deem that to be a qualification; the only qualification is whether the school complies with the definition of a non-public school under the Act.

[18]

Judge Gibbons: I have ruled, Mr. Pfeffer. Do you have another question?

Mr. Pfeffer: No.

Mr. Blewitt: Do I understand the court's ruling to be that the testimony Mr. Czekoski has given as to the series of questions has been stricken?

Judge Gibbons: No, it has not. He has testified that he makes no such inquiry with respect to each of the areas of inquiry Mr. Pfeffer asked about. That's his only testimony so far.

Any cross-examination?

Mr. Blewitt: No, I don't, Your Honor.

Mr. Ball: No, Your Honor.

Mr. Reath: No, Your Honor.

Mr. Thorn: That's all the plaintiff wishes to introduce.

Judge Bechtle: You may step down.

Judge Gibbons: Do the plaintiffs rest, Mr. Thorn?

Mr. Thorn: Yes.

Judge Gibbons: Do the plaintiffs rest?

Mr. Thorn: Yes, they do.

Judge Gibbons: Mr. Blewitt, do you have any witnesses?

Mr. Blewitt: No, I don't, Your Honor.

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Judge Gibbons: Mr. Ball?

Mr. Ball: Yes, Your Honor.

I would like to call to the stand at this time Dr. William David Boesenhofer.

WILLIAM DAVID BOESENHOFER, sworn.

DIRECT EXAMINATION.

By Mr. Ball:

Q. Dr. Boesenhofer, what is your residence?

A. I live at 530 Evergreen Street in Emmaus, Pennsylvania.

Q. And would you tell the court, please, what your occupation is?

A. I am a psychologist employed by Allentown State Hospital and also by Colonial-Northampton Intermediate Unit No. 20.

Q. Will you kindly tell the court what your educational background consists of in chief?

A. I have a Bachelor of Arts Degree in Psychology from Upsala College in East Orange, New Jersey; Master in Education and Doctorate in Education, both areas, in counseling and psychology from Lehigh University in Bethlehem.

Q. Do you possess any State licenses or certificates or other State qualifications?

Mr. Thorn: If the court please, we will concede his qualifications as a psychologist.

Judge Gibbons: We are not familiar with them.

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I would like to hear them so we know what area he is going to testify in.

Mr. Thorn: I didn't mean to preclude the court.

Judge Bechtle: We would like to know.

By Mr. Ball:

Q. Dr. Boesenhofer, do you possess any State licenses, certificates or other qualifications?

A. Through the Department of Education I am certified as a secondary counselor and also as a public school psychologist, and at the present time I am eligible for a State licensure in psychology. This is a new program in the process of being developed in the State.

Q. Are you a member of any professional organizations in your field?

A. I belong to the Lehigh Valley Psychological Association and also the American Psychological Association.

Q. Now, what have been your past employments?

A. From '64 through '69 I taught in the public schools. From '64 through '66 I taught special education in Berks County in Tulpehocken School District. This would have been with educable and trainable retarded children. And from '66 through '69 I taught again educable retarded children in the secondary level in Salisbury Township in Lehigh County.

Q. That brings us down to where you are presently employed?

A. Not quite. After I taught for five years, I had an academic

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residency, one year at Lehigh. During that period I had an internship at Allentown State Hospital, and in May of '69 I was a staff psychologist at the Neuropsychiatric Clinic for Allentown General Hospital, and since October of '70 I was been employed full time at Allentown State Hospital and with the Intermediate Unit I have been doing consultant work there. In February or March of '72, I started there.

Q. How long have you been employed by Intermediate Unit No. 20, Dr. Boesenhofer?

A. It was either February or March of '72 that I first began there, but it has only been since February of '73 that I have been working with non-public schools.

Q. All right. Now, what does your employment for Intermediate Unit No. 20 consist of?

A. My work there is primarily in counseling and consultation. Specifically, when a student is referred for an evaluation, I will interview the student, generally administer some tests, I will write up a report, make certain recommendations for the child, I will have conferences with parents, administrators, counselors, teachers, things of this sort.

Q. How important is that evaluation work you speak of?

Mr. Thorn: Objection. If the court please, I would like to ask for an offer of proof. We may be able to concede whatever he is going to testify to.

Judge Gibbons: Mr. Ball?

[22]

Mr. Ball: Yes, if it please the court, presently we have been establishing the professional and expert qualifications of Dr. Boesenhofer. We would then be moving directly with our questions into areas which very strongly bear upon issues of the primary effects of entanglement which are issues in this case, and in order to do that, we need to know the nature of the work that he is performing and under what circumstances it is being performed within, as we will bring out in a moment, the non-public schools.

Judge Gibbons: Mr. Thorn, to what would you be willing to stipulate in that respect?

Mr. Thorn: Well, I can't make a stipulation on entanglement, obviously, so I guess we will have to hear the testimony.

Mr. Pfeffer: We may stipulate to all the facts, not the conclusions, if Mr. Ball will state what factual witnesses he will call.

Judge Gibbons: It might be quicker to hear the witness than wait for the stipulation. Let's proceed.

By Mr. Ball:

Q. My question, then, Dr. Boesenhofer, was with respect to the importance or the role of the evaluation work you spoke of.

A. The evaluation is basically the beginning of working with the child. I think as such it kind of opens the door to correction, to remedial work with that child.

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Q. Now, do you perform these services in non-public schools which are religiously affiliated?

A. Yes, I do.

Q. In your work with children of this kind, do you find that there are many such children?

A. Yes, I have.

Q. Can you characterize, can you tell us some of the characteristics of these children which call for your remedial services?

A. Most of the kids that I work with tend to be of average intelligence or above. That is, they are not mentally retarded, but for some reasons these kids are failing in school. Some of them tend to be very withdrawn in the classroom. Some of them may be very hyperactive, some of them very disruptive, various kinds of emotional or social problems which I think negatively affect their learning, and it is these things that I look at specifically.

Q. Are these kinds of children found in all schools, that is, public and non-public?

A. Yes, they are.

Q. Now, coming to the technique of your psychological evaluations, just a question or more on the nature of your work: What do your psychological evaluations actually consist of? What do you do?

A. With the child?

Q. Yes, and with others if there are others?

A. As I stated, with the child, first of all, I conduct a

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rather intensive interview. After that, I will administer certain tests such as an intelligence test, an achievement test, certain personality inventories. I will write up the report, make recommendations, meet with the teacher, suggest things that the teacher might do to work with the child. If necessary, I may refer to a community agency such as mental health, mental retardation, things that the guidance counselors in the school might do to work with the child, things of this type.

Q. Of what value are the psychological services which you render? Of what value are they to children in your professional opinion?

A. As I say, I think they are the door, they open the way to correction. I think it is very important to get at these kids who have difficulties early to hopefully get at some kind of correction, psychotherapy, counseling, possibly placement in some sort of special classroom environment.

Q. Were these psychological counseling services available in the non-public schools which you served prior to the enactment of Act 194?

A. It is kind of difficult to answer. Yes and no. They were available but in a roundabout way.

Q. What do you mean by "in a roundabout way"?

A. A child in a non-public school could be referred for a psychological evaluation prior to this Act. The differ-

ence was the child had to be brought into a public school to be seen. I could not go into a non-public school to see the child.

[25]

I have had cases in the past where a child in a non-public school was brought into a public school for an evaluation, but the majority of children were not referred for this kind of thing.

Q. Comparing the present system under Act 194 in which you go to the schools in order to render service with the pre-existing roundabout way that you have described, which in your professional opinion renders the better service to children?

A. I believe it is much more desirable to go into the non-public—for me—to go into the non-public school.

Q. Dr. Boesenhofer, I would like to ask you what your religious affiliation is?

A. I belong to the Lutheran Church.

Q. Is it your understanding that under Act 194 there are any legal restraints respecting religion?

A. I am not sure what you mean.

Q. Are there any restraints which you understand you must observe with respect to religious inculcation or reflecting religion in connection with your rendering the service?

A. Yes. I am not permitted to reflect any kind of religious teachings.

Q. As a public employee, do you consider yourself bound to obey the laws of the Commonwealth, State and Federal Constitutions?

A. Yes, I do.

Q. In your offering of psychological services under Act 194 in

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non-public schools, will you tell the court whether you have ever attempted to influence children in favor of the Lutheran faith?

A. I never have done this, no.

Q. Have you introduced religious ideas, materials, or subject matter in connection with your work?

A. In no way at all.

Q. In your offering of these services, do you offer any of these services in Catholic schools?

A. Yes, I do.

Q. In your offering of these services in Catholic schools, have you encountered any disputes with religious authorities in those schools over the precise meaning and extent of the legal restraints against introduction of religion into your work?

A. There have been no disputes or any kinds of problems.

Q. Have you felt any pressure to conform to Catholic or other religious views?

A. None whatsoever.

Q. Has any sort of religious atmosphere in those schools caused you in any way to start reflecting religion in your work in those schools?

A. No.

Q. Suppose you felt, Dr. Boesenhofer, professionally, now, that a child in a Catholic school or a Moravian school or some other religious school would do better in a public institution, what would recommendation be?

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Mr. Thorn: Objection.

By Mr. Ball:

Q. Would you make a recommendation?

I will rephrase the question.

Mr. Thorn: I will withdraw the objection.

Mr. Pfeffer: We withdraw the objection.

Judge Bechtle: The question is, would you make a recommendation?

The Witness: Yes, I have made this type of recommendation already and a child is now in a public school.

By Mr. Ball:

Q. You have made a recommendation, may I ask, that he be transferred? Is that your answer?

A. Yes.

Q. Suppose you felt professionally that a particular child in a religiously-affiliated school, let's take a Catholic school, as an example, should be under a male teacher rather than under a female teacher who is a nun. What would your recommendation be? Would you make a recommendation?

A. I have already made this type of recommendation also.

Q. Did you encounter resistance or objection or pressure on the part of authorities in such Catholic school to your recommendation?

A. None whatsoever. They followed through with the ideas.

Q. Now, apart from these legal restraints on introducing religion under Act 194 which we have been talking about, are there

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any other restraints which you feel against your utilizing your professional services for purposes of religion?

A. Well, as a member of the American Psychological Association, there are ethical standards for psychologists and these certainly prohibit introducing any kind of religion into one's professional practice, so ethically I certainly could not reflect any religion or bootleg any religion through my work as a psychologist. There are, of course, penalties for not adhering to these ethical standards.

Mr. Ball: Thank you, Dr. Boesenhofer.
Those are all of our questions, Your Honor.

Mr. Reath: No questions, Your Honor.

Mr. Blewitt: No questions, Your Honor.

Judge Gibbons: Any cross-examination, Mr. Thorn?

Mr. Thorn: No, no questions.

Judge Gibbons: Judge Higginbotham?

By Judge Higginbotham:

Q. How many students have you seen since you started to work under this specific program?

A. Under Act 194?

Q. Yes, sir.

A. I have only seen 11 to date.

Q. 11? And of those 11 students you have seen, what type of school were they going to?

A. What type were they going to?

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Q. Yes.

A. They were in a non-public school.

Q. What type of non-public school?

A. Roman Catholic.

Q. How many times have you made a recommendation that a child be transferred from a non-public school to a public school?

A. One time.

Q. And you testified about what was available prior to the present system. I gather that you have seen children in a public school who had been referred there from a non-public school before?

A. That's correct.

Q. But you testified that apparently you didn't have that with any frequency?

A. No.

Q. Why? Was there just as much a need then?

A. The need was just as great. I could only speculate as to reasons.

Q. What is your most reasonable judgment as to why they weren't sent over to the public school?

A. Physically I think it is extremely inconvenient to have a child brought from one school building to another. They may be some distance away. Also I think from my aspect it is a lot more difficult for a child to see me for the first time, a stranger, in an unfamiliar school.

Q. Would the quality of your judgment, your professional judgment,

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and you capacity to help the kid be significantly deterred simply because the child had to come to the public school to be consulted by you or for you to see him?

A. It could be a detriment in some cases. It depends upon the child and the nature of his problem.

Judge Higginbotham: Thank you.

By Judge Bechtle:

Q. When you interview a student, where does the interview take place? What is the setting of the interview? Are you alone with the student?

A. Yes, I am.

Q. Did you ever interview with anyone present?

A. No, I didn't.

Q. Like a teacher?

A. No.

Q. And the tests that are given, the written tests, where does the underlying written material come from? Do you develop that yourself or where do you get those materials?

A. No, these are standardized what they consider classified tests published by Psychological Corporation.

Q. And the recommendations that you make you reduce to written form?

A. Yes, but I also have a conference with the teacher or counselor on the student.

Q. Usually alone?

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A. Yes.

Q. And who receives a copy in the usual case of your written report and recommendation?

A. It goes to the school. I assume it is kept in the counselor's office. The teacher would also see a copy of this but it would not be kept with the teacher because it is a confidential report.

Q. Right. And in addition to that filing, is there any copy filed with any official of the Commonwealth?

A. The Intermediate Unit keeps a copy of this.

Judge Bechtle: All right. That's all I have.

By Judge Gibbons:

Q. Does the parent get a copy?

A. No, they do not.

Q. In evaluating the children to whom you render service, is it significant in your evaluation for you to personally observe the school atmosphere?

A. At times, yes; generally, no.

Judge Gibbons: The court has no further questions. Do counsel?

Mr. Ball: We are ready to call our next witness, Your Honor.

Judge Bechtle: You may step down. Thank you.

Judge Gibbons: Call your next witness.

Mr. Reath: If Your Honor please, I wonder if I could

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ask a procedural question at this time as to how long we will sit? And I also direct attention of plaintiffs' counsel, with my brief which I filed, I filed affidavits from two head masters of schools setting forth facts relating to the harm that would flow to those schools if funds which have already been allocated for programs for this school year were to be interfered with by action of the court. This today is the opening of school for two of the schools and I do not have the head masters in court. I have one, Mr. John Jarvis, who has come down from Lancaster County.

I am prepared to rest on the affidavits that have been filed and I wanted to find out now whether or not counsel will require or whether the court would require the affiants being in court for cross-examination, because if so, then I would like to make arrangements with the heads of schools now and have some idea as to scheduling.

Judge Gibbons: Mr. Thorn?

Mr. Thorn: I haven't seen the affidavits. If I may look at the affidavits, we may be able to stipulate to that.

Mr. Reath: Well, they have been filed and served on you. I will be glad to give you a copy, Mr. Thorn, if you want to take a look at it during this morning's session.

(Discussion off the record at counsel table.)

Judge Gibbons: As to how long we will continue with the hearing, we will continue until such time as the parties

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have put in such evidence as they want to put in on the motion for a preliminary injunction.

Mr. Reath: Mr. Ball, how long do you think your witnesses will take?

Mr. Ball: Well, Mr. Reath, we are not calling our full list of witnesses. We have Miss Stopper, we have Sister Mary Dennis Donovan, and we have two parties. I don't think that the tail end of our testimony is going to be lengthy.

Judge Gibbons: Mr. Reath, suppose we come back to the question of your affidavits after Mr. Thorn has had a chance to read them if he hasn't seen them, and meanwhile Mr. Ball can proceed with his next witness.

Mr. Reath: Fine. That's fine with me.

Judge Bechtle: Would you care to look at the court's copy of the affidavits?

Mr. Pfeffer: We have them here.

I think I ought to make clear to the court our position. Our position is—this is why we did not cross-examine the previous witness—our position on this application, and this application only, not necessarily on the trial—is that the statute on its face is unconstitutional, and that our right to a preliminary injunction is predicated upon the facial unconstitutionality of the statute.

I think we ought to make that clear.

Judge Gibbons: Is that your only position?

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Mr. Pfeffer: That is the only position at this proceeding, not, of course, in the event of a trial of the issues, but our only position in this proceeding is the position that the statute is unconstitutional on its face and that our right to a preliminary injunction is predicated upon that assumption, upon that contention.

PAULINE DOROTHY STOPPER, sworn.

DIRECT EXAMINATION.

By Mr. Ball:

Q. Miss Stopper, where is your residence?

A. I live in Allentown, Pennsylvania. My address is 313 South Franklin Street.

Judge Bechtle: Speak loudly.

Judge Gibbons: You will have to speak up a little bit because we have to hear you way over on this side of the bench.

The Witness: O. K.

By Mr. Ball:

Q. What is your occupation?

A. I am a speech therapist.

Q. Would you state briefly for the court your educational background?

A. I have a bachelor's degree from Bloomsburg State College, Bloomsburg, and there I majored in speech pathology and audiology.

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Q. Do you possess any State licenses, certificates or other qualifications?

A. I am certified by the Department of Education here in Pennsylvania at the Instructional I level.

Q. How are you employed at the present time?

A. I am employed by the Carbon-Lehigh Intermediate Unit as a speech therapist.

Q. Now, what does your employment by this intermediate unit consist of, what do you do?

A. I work with children who have speech problems. That goes into stuttering, articulation, language, voice problems. It also consists of, for instance, screening the children, finding out who has a problem, then developing a case load and then actual speech therapy.

Q. How long have you been employed by Intermediate No. 21, Miss Stopper?

A. I was employed during the school year of '72 and '73. I worked in a summer speech program and now this year.

Q. Very well. As a professional speech therapist, is it your observation that there are many children who have speech problems?

A. I think with that question I should answer it giving you what our professional journals say. The American Speech and Hearing Association publishes a journal or several of them and in that they have indicated that there are between five and up to ten per cent of the public school population that have speech problems.

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The reason I emphasize "public school" is because that's where the research was done.

Now, when I took this job, out of simple professional interest, I decided to find out what types or what percentages my schools had in relation to what my profession says there should be. In some schools I found it rather high. There was one up to 19 per cent which I thought was extreme. There was one around 15. There were several around 11 per cent. The average was above what the American Speech and Hearing Association said there should be, and I thought that was an interest of the profession.

Q. What schools are they, public or non-public, to which you are referring now?

A. I work in the non-public schools.

Q. Now, therefore, you find that there are children who need speech therapy in both public and non-public schools?

A. That is correct. I do find, though, that there is a greater need in the non-public schools, and the reason I say that is because it is almost like a frontier. There have not been services—well, there have—let's say there have been services, but they haven't been adequate in any way.

For instance, out of the children that I have seen screened in my schools, I have located approximately 350 children that could use speech therapy, but when I went

into those schools, the only children that had been receiving speech therapy was the No. 17. There were 17 that were being taken from the parochial

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school into the public school to get their speech therapy.

Q. To what do you attribute this lack of service, to what do you attribute the fact that only 17 had had the speech therapy?

A. I have read what was published by my Intermediate Unit as the guidelines for accepting children from a parochial or non-public school into a public school speech program. That guideline said that it was up to the speech therapist's time and discretion whether to accept the children in their programs or not.

One of the problems there was, I think it was mentioned by the psychologist, transportation for one, but discretion of the speech therapist was also important, I found.

Q. What do you mean by "the discretion of the speech therapist"?

A. Well, if she could fit it into her case load, that was the major one, if she could fit it in, and if she already had a full case load, many times the children were refused.

Q. Was it your observation that she did or did not often have a full case load of public school children?

A. I would say many times that she had a full one, but I would also say that there was one that I know of specifically who came in. She was a public school therapist. And she came in a half hour earlier to take some children from a parochial school. So it depended on the therapist.

Q. In your professional opinion, Miss Stopper, what would be the effect of termination of the speech therapy services program which is provided under Act 194?

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A. I just feel very strongly that that would be very damaging to those children because, like I said, there are so many children need those services, and I am only one therapist, and I have enough children that it would be, you know, enough for three therapists, and I just feel that to terminate them would be very damaging to those kids. When you think of speech as what it is, you know, communication between two people, maybe I am partial because of my profession, but speech therapy to me is extremely important. Not only does it involve the social development of the child but it is educationally, too. It often interferes with his learning because teachers will tell me, "I can't understand this kid," and it really is interfering, so he not only becomes a problem to his teacher, to his parents at home sometimes, but himself and the children around him. He becomes a problem.

Q. Miss Stopper, what is your religious affiliation?

A. I am a Catholic.

Q. Is it your understanding that under Act 194 there are any restraints respecting introduction of religion in the services?

A. Yes, I understand the legal restraints. I have sat through several meetings where we were told and retold of those restraints.

Q. In your offering of speech therapy services under Act 194 in non-public schools, do you or have you attempted to influence children in favor of your religious faith?

A. No, I have not.

Q. As a public employee, do you consider yourself bound to obey

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the laws of the Commonwealth and the State and Federal Constitutions?

A. I do.

Q. Have you introduced religious ideas, materials or subject matter into your services?

A. Not in any way.

Q. In your offering of services in Catholic schools to which you refer, have you encountered any disputes with religious authorities in those schools over the precise meaning and extent of this legal restraint concerning non-introduction of religion?

A. I have not encountered any disputes. As a matter of fact, in several of my schools, the children are dismissed whether there is some religious activity or not. The principals insist that those children get those speech lessons.

Q. In those schools have you felt any pressure to express Catholic religious views?

A. No.

Q. Has any sort of religious atmosphere in these schools caused you in any way to start reflecting religion in your work in those schools?

A. No.

Q. Suppose you felt professionally that a child in Catholic schools would do better speech therapy-wise in a public institution. Would you make a recommendation?

A. You say speech therapy-wise? I am assuming you are referring to maybe a clinic or something a little more specialized?

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Q. Yes, if you felt, in other words, Miss Stopper, that for the good of that child, that child ought to be in a public institution where its speech and learning problems would be more adequately treated than in the Catholic school where you came to serve that child?

A. I would definitely refer them for that reason. I have referred them for other reasons associated to inade-

quate services in the parochial schools. For instance, a learning problem, a child was at the sixth grade level in school, but he was second grade reading level, and I recommended public school services, you know, transfer of the child for that reason.

Q. Now, apart from these legal restraints that we have been talking about on 194, are there other restraints which you recognize against your utilizing your professional services to inculcate or reflect religion?

A. The American Speech and Hearing Association has a certain code of ethics and in that there is nothing that recommends that I use any professional judgment, opinion and knowledge to reflect religion. There is not.

Mr. Ball: Thank you, Miss Stopper.
Those are all the questions, Your Honor.

Mr. Reath: No questions, Your Honor.

Mr. Thorn: No questions, Your Honor.

Mr. Blewitt: No questions:

Judge Gibbons: Call your next witness.

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Mr. Ball: Our next witness is Mr. David A. Horowitz.

DAVID A. HOROWITZ, sworn.

DIRECT EXAMINATION.

By Mr. Ball:

Q. Mr. Horowitz, what is your residence, please?
A. I live in Philadelphia at 22nd and the Parkway.

Q. What is your occupation?

A. I am Associate Superintendent for Schools for Special Services in the School District of Philadelphia.

Q. Would you please state for the court your educational background?

A. I have a graduate degree from Temple University and I have attended schools throughout the school system in Philadelphia through its high schools, taken my undergraduate and graduate work at Temple University.

Q. Now, what have been your past main employments, Mr. Horowitz?

A. I have been employed in the Philadelphia public schools. This is the beginning of my 40th year. I have been a teacher, a principal, a district superintendent. I have been in charge of curriculum development in this school system. I have been a deputy superintendent, presently an associate superintendent, reporting directly to the superintendent of schools and to the

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Board of Education.

Q. Are you a member of any professional organizations in your field?

A. Yes, I am. I am a member of an honorary society in the field of education which includes both academicians and practitioners, Phi Delta Kappa, a member of the American Association of School Administrators, the Schoolmen's Club locally here in Philadelphia.

Q. Have you published anything in your field, Mr. Horowitz?

A. I have published some articles and I have contributed to a great many, a large number, I should say, curriculum guides for teachers in the fields of mathematics, of science, English and social studies. I wrote a good portion of the Non-Discrimination Committee Report of the

School District of Philadelphia, which was issued about six or seven years ago.

Q. Have you been the recipient of any awards or any special recognition?

A. In 1964 my Alma Mater, Temple University, cited me as one of their distinguished alumnus members.

Q. As an associate superintendent, what are your areas of responsibility?

A. I have these areas of responsibility: pupil and personnel counseling, which includes the enforcement of the attendance laws, the counseling and guidance program of the School District of Philadelphia, the entire area of special education which includes

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a wide range of programs for different categories of handicapped children. The Federal programs are my responsibility, research, alternative programs, inter-system coordination, instructional computers, and early childhood education.

Q. In your capacity as an associate superintendent have you had any relationship or responsibility with respect to the Federal Elementary and Secondary Education Act?

A. Yes, I have. I have had very direct responsibility for that, reporting both to two former superintendents and the Board in those periods of time and the present superintendent and the Board of Education.

Q. Referring to Title I of that Act, would you tell the court in brief what you understand that part of the Act to be about?

A. Title I of the Elementary and Secondary Education Act provides educational services to economically-deprived children who in this instance reside in the County of Philadelphia no matter what schools they happen to attend.

Q. What kind of services are you speaking of?

A. We are speaking of services in basic education, certain enrichment programs, particularly on the secondary level, certain counseling and guidance programs, programs in bi-lingual education to help the growing number of Spanish surname children who are enrolled in the Philadelphia Public Schools.

Q. And Title II?

A. Title II is the Library Act. That one is administered directly

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by the State of Pennsylvania. Its allocation of funds are made separately to the School District of Philadelphia and to the non-public schools of Philadelphia directly.

Q. Are pupils in the non-public schools then included as beneficiaries of these E. S. E. A. programs?

A. Yes, they are, and according to the law, that is the intent.

Q. Does this include children in religiously-affiliated schools?

A. Yes, it does.

Q. Now, how long have these E. S. E. A. programs been operational in the School District of Philadelphia?

A. Well, in the nation as a whole, including Philadelphia, the Elementary and Secondary Education Act began to operate during the school year of '65, '66.

Q. How long have you personally been involved in these E. S. E. A. programs in the School District?

A. I have been the person responsible for the administration of these Acts from the very first day of the implementation of the Acts.

Q. Is there any comparison which can be made between these E. S. E. A. programs and the programs which are afforded under Acts 194 and 195?

A. Yes, there can be. In some ways they are similar in that there is a broad range of educational benefits that accrue to children, no matter where they happen to be enrolled.

Q. Are the services under Title I enjoyed by non-public school

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children on their own premises in whole or in part?

A. Yes, they are.

Q. With respect to Act 194, are you familiar with Act 194, Pennsylvania's Act 194 of 1972?

A. Yes, I am, sir.

Q. In what capacity? How did you come to be familiar with such a program?

A. I came to be familiar with it because in my range of responsibilities which includes Federal programming of a broad spectrum, that comes under the umbrella of my responsibilities and therefore as soon as the Act was passed, I made it my business to become fully acquainted with it.

Q. Now, respecting the auxiliary services under Act 194, have you formed an opinion as to the value, a professional opinion as to the value, of these services to children?

A. I can only judge it in this way, that the auxiliary services that have been enjoyed by pupils in public schools, the schools that I know best, that these services are important to them, to their development, to their education process, to their future vocation, and I can I think fairly assume that they would be just as valuable to any children enrolled in any schools.

Q. Are these auxiliary services under Act 194 part of the ordinary regular school curriculum or program?

A. In the public or non-public schools, sir?

Q. Well, in the non-public school?

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A. Are they? Generally not, to my best knowledge. They have existed in a rather spotty way and I say this only from second-hand information.

Q. I would like now——

If Your Honor please, may I approach the witness? I have an exhibit to show him.

Judge Gibbons: Yes.

By Mr. Ball:

Q. I am turning now to a part of Defendant's Exhibit D-19. Will you please tell the court what D-19 is and how it was prepared?

Mr. Thorn: If the court please, may we have a copy of that?

Mr. Pfeffer: I saw a copy this morning but we don't have one.

Judge Gibbons: Do you have any copies for opposing counsel and for the court, please?

Mr. Ball: Yes, we have.

(Discussion off the record at counsel table.)

A. D-19 is an excerpt from a required report that must go to the State on medical services that are provided within the County of Philadelphia, and if I may presume to say, that medical services in the County of Philadelphia are provided under the jurisdiction of the public school system for all pupils regardless of whether they attend public or non-public schools.

By Mr. Ball:

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Q. Looking at the audiometric test results as they are shown there, what does this indicate to you with respect to hearing problems of children?

A. Well, it indicates that there is a great need for audiometric testing for all children, and if you wish, I could cite the figures here for both public and parochial school children if you wish.

In this report in the public schools, audiometric tests were given to approximately 180,000 children, and approximately 5300 children failed which means that they had some hearing deficit ranging from mild to deafness, I would say.

In the parochial schools, that is, the Catholic parochial schools, about 68,000 children were tested and about 3500 failed.

In other private schools, about 2300, and 107 failed.

And some smaller figures going down that list which I can read out if you so wish or if the court should wish.

Q. I would like to direct your attention now, Mr. Horowitz, to Pages 2 through 9 of Exhibit D-19, and would you just very simply summarize what they show?

A. Page 2 indicates the standards that we in the Philadelphia Public Schools adhere to in furnishing and in equipping new schools, and they are given here according to various kinds of audio-visual equipment, recorders, screens, television, duplicators, projectors, listening centers, et cetera, et cetera. And they are given here as to the number per school and also the expenditure

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that would be involved.

Q. Is it your opinion professionally, Mr. Horowitz, that these standards would be applicable in the case of

children generally regardless of the school situation in which they are found?

A. There is no question in my mind regarding that, that they would be equally applicable no matter where the school, the children, rather, were receiving their education.

Q. Let me last then turn to Page 6 of D-19, Mr. Horowitz. What is the significance of that?

A. On Page 6 and following through, I believe, on 7 and 8 are the standards published by the American Library Association, equipment standards for what we now call instructional material centers, and you have standards here for the number of projectors, for teaching stations, the kinds of projectors, other kinds of audio-visual equipment, opaque projectors, 2 by 2's, T. V. receivers, micro projectors, record players, audio tape recorders, listening stations, projection carts and screens, closed-circuit T. V. which is just being introduced and is certainly a dream for the future in education, radio receivers, copying machines, duplicating machines, and so on and so forth, all the way down the list, and for fully-equipped instructional material centers that would be equipped to conduct a full-blown modern educational program, these are the standards that professionals after a great deal of discussion have come to the conclusion that these are necessary.

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Q. Now, Mr. Horowitz, in your professional opinion, focusing now on services under Act 194, in your opinion, can such services be afforded non-public school children at public centers?

A. At public schools?

Q. Yes.

A. No, I don't think so.

Q. Why is that?

A. Well, for many reasons, and depending on the specific, you know, item to which you are referring, where this equipment is being used, it is being fully utilized and cannot carry additional service or service time given to additional pupils who might come in plus the logistical problems of bringing in children or groups of children for a specific piece of an instructional program at a given time of the day and given weeks of the year. Logistically it just isn't possible.

Q. Let me ask you now with respect to the situation before Acts 194 and 195, did the School District of Philadelphia provide it to the non-public school population?

A. No, they have not.

Q. Could they?

A. No, they could not.

Q. Is it your impression as a school administrator concerned with Act 194 that non-public school children did receive these benefits prior to these Acts?

A. I believe—and this again is on information that has been

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reported to me because of my recent connection with the administration of these Acts—that where they existed, there was a range of not existing at all to very spotty kind of coverage of these kinds of services, sometimes depending on the ability of the individual parent to afford certain kinds of services.

Q. In your professional opinion, does the loan of textbooks, instructional materials and instructional equipment under Act 195 constitute a benefit to children?

A. I certainly believe that.

Q. In your professional opinion what would be the effect of the cessation of the programs under 194 and 195?

A. I think it would be a highly disruptive if not disasterous effect because the recent introduction of services and equipment that makes certain kinds of programs available or enriches the implementation of certain kinds of programs, this would suddenly cease after it has had a year or a little more than a year of implementation.

Q. In your capacity of administering in relation to E. S. E. A. and then again in connection with Acts 194 and 195, have you had relationships with the Roman Catholic non-public schools in Philadelphia?

A. Yes, I have.

Q. In that relationship have you known of situations of religious content or orientation arising out of or relating to those programs?

A. I know of none.

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Q. If there had been any situations would you likely have known of them?

A. I think so, because a number of the employees who report directly to me have responsibility to see to it that the provisions of the Act or Acts are strictly adhered to. In addition to that, sir, we meet periodically, oh, a few times every year, and quite regularly, as a new Act, for example, 194 and 195, when they were introduced, we set out very clearly what the constraints are in the use of services and in the purchase of equipment and textbooks and whatever else is made possible through these two Acts. We have so stated that at every meeting that we hold with non-public school administrators and teachers and we have put that in writing as well.

Q. You have put what in writing, Mr. Horowitz?

A. We have put in writing that they may not, they may not introduce religious content or adopt a religious orienta-

tion either in the teaching or in the service provided or in the selection of materials that are made available because of these two Acts.

Q. In your eight years of involvement in and responsibility concerning E. S. E. A. and now the 194 and 195 programs, have there been to your knowledge any instances wherein the religious atmosphere in a Catholic or other parochial school has caused the auxiliary service teachers in the school to start reflecting religion even unintentionally in the instruction they provide?

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A. I know of none. I know of no such situations or instances.

Q. Mr. Horowitz, I want to turn now to Defendant's Exhibit No. D-15 which I have handed you when I handed you D-19. I wonder if you will please tell the court what this is and how it came to be prepared?

A. This is a letter which I sent to the principals of all non-public schools. Do you want me to read this letter or just refer to it?

Q. I don't think that you need to read it unless the court desires it to be read, Mr. Horowitz. The court has the letter before it.

How did this come to be prepared, Mr. Horowitz?

A. This came to be prepared as a result of our annual concern with respect to strict adherence to these Acts which we have communicated in various meetings and conferences, large groups and small groups, as well, and these questions have come up.

Q. In the first year of operation of this Act, had the substance of that letter been transmitted orally to participants in the program?

A. Yes, sir, not only the first year but every succeeding year as well.

Q. And also to non-public school administrators concerned with these programs?

A. Yes, sir, routinely so.

Mr. Ball: I have no further questions, Your Honor.

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Mr. Reath: I have just one question.

By Mr. Reath:

Q. Dr. Horowitz, you made reference to E. S. E. A. I want to be sure I understand that you were referring there to a Federal Act; is that correct?

A. That's the Elementary and Secondary Education Act.

Q. And those are all funds that come from the Federal Government?

A. Yes, sir, and channeled through the State, sir.

Q. And those have been in effect as I understood you to say since 1966?

A. The year of '65-'66, yes, sir.

Q. All right. And that to a great extent the programs that are authorized under Acts 194 and 195 parallel the programs that are authorized by the Federal funds under E. S. E. A.?

A. There is a good deal of congruence there, yes, sir.

Mr. Reath: All right. Thank you.

Judge Gibbons: Mr. Thorn?

Mr. Thorn: No questions, Your Honor.

Judge Gibbons: Judge Higginbotham?

By Judge Higginbotham:

Q. Dr. Horowitz, in your breakdown, D-19, you categorize schools as public, parochial and private. How many of these schools which are beneficiaries of this program in your district are parochial and how many are private?

A. You mean Catholic parochial, sir?

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Q. Well, I am using your terminology. Does "parochial" mean Roman Catholic?

A. Yes, Roman Catholic. I would say about 145 within the County of Philadelphia.

Q. And how many others?

A. I really don't know the exact number but they represent a wide range of religious affiliation.

Q. In one of the cases, the Lemon case, there was a statistic in it which pointed out that 96 per cent of the pupils there involved attended church-related schools. Are you able to give an estimate on the basis of your jurisdiction as to what per cent of the students attend church-related schools?

A. Of the non-public schools?

Q. Yes.

A. I would say a very large per cent. I don't know exactly but it must be at least 90 per cent.

Judge Higginbotham: Thank you. I have no further questions.

Judge Bechtle: I have none.

Judge Higginbotham: Good to see you again.

The witness: Good to see you.

Mr. Blewitt: May I ask one question?

Judge Gibbons: Yes.

By Mr. Blewitt:

Q. Mr. Horowitz, can you estimate if possible the effect of a

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preliminary injunction on teachers' contracts, employment contracts, if the court should conclude that Acts 194 and 195 would be suspended pending a final injunction?

A. Well——

Mr. Thorn: Excuse me. If the court please, there is not supposed to be any contracts since at the first hearing we had in this case in May the court pointed out that any such contracts would be made at the peril of the defendants.

Judge Gibbons: I did point that out at the first hearing. It might be interesting to know what the factual situation is——

Judge Bechtle: What those perils are.

A. Would you mind repeating your question, now?

By Mr. Blewitt:

Q. What the effect would be on teachers' contracts, teachers' and auxiliary service personnel contracts if the court should conclude that Acts 194 and 195 would be suspended pending a final injunction.

A. Well, we have no long-range contracts with any personnel with whom we have contracted or institutions that provide the personnel. It is on a year-to-year basis. There is nothing that would bring these people into the Federation of Teachers' Bargaining Unit, for example, or the bargaining unit of non-public schools. These are year-to-year contracts specifically stated for whatever service and the amount of service that's called for.

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Mr. Blewitt: Thank you.

Mr. Ball: Our next—excuse me, Your Honor.

Judge Gibbons: We will take a five-minute recess at this time.

(A recess was taken at 11:35 A. M.)

Judge Gibbons: Mr. Ball, do you have another witness?

Mr. Reath: If Your Honor please, I can report that Mr. Thorn and Mr. Pfeffer have agreed to the affidavits so that I will not have to call those two witnesses.

I have only one witness, Mr. John Jarvis, and I wonder would it be presumptuous of me to ask what the court's schedule was for recessing for lunch? I gather that Mr. Ball has only about another half hour of witnesses and I would take about 15 minutes with Mr. Jarvis and could get him on before the lunch break depending on what the court's schedule would be.

Judge Gibbons: If that's the case, we will finish without taking a lunch break.

Mr. Reath: Very well, sir.

Judge Gibbons: These affidavits to which you made reference, are they then to be offered in evidence?

Mr. Reath: Yes, sir.

Judge Gibbons: Let's get that over with now.

Mr. Pfeffer: Your Honor, I presume Your Honors are allowing time for argument for counsel on the legal issues which

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is really what our case is about.

Judge Gibbons: Yes. Well, we will finish the testimony before we take a lunch break.

Mr. Pfeffer: Thank you.

Judge Bechtle: Mr. Reath, which two persons' affidavits are you offering?

Mr. Reath: These are the affidavits, Judge Bechtle, that were attached and filed at the same time as our brief. One is the affidavit of Anne C. Shoemaker, the head mistress at the Baldwin School, with exhibits attached, and the other is the affidavit of Frederick C. Calder.

Judge Gibbons: Are they referred to in the joint final pre-trial order?

Mr. Reath: I don't believe that they are, sir.

Judge Gibbons: Then we had better give them different numbers.

Mr. Reath: All right, sir. So that perhaps for the record I will have a record copy of the affidavit which I will use now.

Do we have any exhibit numbers?

Judge Gibbons: D-20 and D-21.

Mr. Reath: All right.

Judge Gibbons: D-20 is the affidavit of whom?

Mr. Reath: Of Anne C. Shoemaker.

Judge Gibbons: And D-21?

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Mr. Reath: D-21 is the affidavit of Frederick C. Calder.

And at this time, if Your Honor please, I hand up the two affidavits, D-20 and D-21, and I offer them in evidence.

Judge Gibbons: Both of them will be marked in evidence.

Mr. Reath: I believe copies of those have been furnished to members of the court in connection with our briefs.

Judge Gibbons: Those exhibits which are marked in evidence we will leave in the possession of the court deputy for the time being. Would you mark those?

Judge Bechtle: Mr. Dunbar, mark those D-20 and D-21. They will be received in evidence and become part of the record.

(Affidavits of Anne C. Shoemaker and Frederick C. Calder were marked Exhibits D-20 and D-21 and received in evidence.)

Judge Gibbons: Mr. Ball, do you have another witness?

Mr. Ball: Do I?

Judge Bechtle: Let me just make this observation: I think those very two documents will become the court's exhibits.

Mrs. Elliott: Fine. I will return in just a moment.

Judge Bechtle: O.K. You will return them to Mr. Dunbar?

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Mrs. Elliott: Right.

Judge Bechtle: Thank you very much.

Mr. Ball: At this time the defendants would like to call to the stand Sister Mary Dennis Donovan.

SISTER MARY DENNIS DONOVAN, sworn.

DIRECT EXAMINATION.

By Mr. Ball:

Q. Sister, what is your residence, please?

A. I live at 2112 Sidney Street in Pittsburgh.

Q. What is your occupation?

A. Presently I am the Coordinator of Human Relations Education for the Parochial Schools in Pittsburgh.

Q. Would you tell the court, please, briefly your educational background?

A. I have a Bachelor of Science in Education from Duquesne University and a Master in Educational Administration. I have done some post-graduate work in sociology at St. Louis University.

Q. Now, what may have been your past main employment, Sister?

A. I was an elementary teacher for about 20 years and taught in high school social studies for about nine years and I have been principal of an elementary and a secondary school.

Q. What kind of schools are these?

A. Parochial schools.

Q. Catholic parochial schools?

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A. Catholic parochial schools.

Q. Are you a member of any professional organizations in your field?

A. Yes, I have been on the National Council of Social Studies Teachers, in the Middle States Council of Social Studies Teachers, the Association for Curriculum and Supervision from the NEA and then the National Catholic Education Association and the Pennsylvania State Education Association.

Q. Thank you. Have you published anything in your field, Sister?

A. Yes, sir, I have published three civics books for use in our schools.

Q. Could you identify these, please, who published them?

A. Back in 1948, "The Christian Citizen" was the first book published by Mentzer, Buch and Company, revised every two years up to 1962 when it was taken over by Holt, Rinehart and Winston, and then in 1967 I did another one called "The Responsible Citizen," and a third one back in the 1950's—I am not sure what year—"The Teaching of Civics in the Catholic Elementary School."

Q. Have you been the recipient of any awards or special recognition?

A. Yes. The most recent was from the United States Civil Service Commission, a special award for a program that I developed with the OIC.

Q. What is the OIC, please?

A. Office of Industrial Organization, I believe. It is training

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black employees, and we worked with the Post Office in Pittsburgh.

Q. Have you participated in any public or community programs?

A. Yes, very much so. I belonged to the Women in Urban Crises with is an ecumenical group of women organized at the time of the racial disturbances in Pittsburgh and has been very active since. I was on the committee that established Call for Action in Pittsburgh which is the KDKA, and then volunteers from our organization, manning phones, taking care of—I belonged to the Public Affairs Committee at the YW. I was on the Public School Re-Organization Advisory Committee. I belonged to the Community Action, the South Side Neighborhood Community Action Group in Pittsburgh.

Q. Sister Mary Dennis, are you familiar with Pennsylvania's Acts 194 and 195?

A. Yes, reasonably so.

Q. Have you in any way been involved in those programs?

A. Yes.

Q. Could you state in what way?

A. In my capacity as Coordinator of Human Relations Education I advised on particularly group counseling materials, films, and so on, and then conducted several work shops or arranged for several work shops for numbers of teachers who would be trained in human development, group guidance skills.

Q. Focusing now on Act 194, auxiliary services, psychological service, speech, hearing and so on, as an educator and an educational

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administrator, what is your professional opinion as to the value of these programs for children?

A. I consider them very valuable because from my point of view all of these things at one time were considered luxuries and now they are absolutely essential to the chil-

dren's being receptive to the educational opportunities that are offered to them. The whole society is suffering from the effects of rapid change and I believe children also and the speech therapy and the psychological testing and the area that I am in, the group guidance, human development, I think, are very, very essential today. They are not luxuries any more.

Q. You mean in the case of all children, non-public school children as well as public school children?

A. Definitely all children, yes.

Q. Did non-public school children enjoy benefits in the Diocesan schools of Pittsburgh prior to providing them under Act 194?

A. I am not sure I understand the question.

Q. In the schools of Pittsburgh, the non-public Diocesan schools in Pittsburgh with which you have been associated, did children get these services prior to Act 194?

A. In a very limited and spotty way. With things as they are now, many of these require specialists who require a great deal more money than we have had. Through the E. S. E. A., Title I, Title III, some of our children received some of these services, but the E. S. E. A. seemed to be narrowing down to more and more service for

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fewer and fewer children and they weren't reaching the large percentage of children in the school.

Q. In your professional opinion what would be the effect of the cessation of the programs now being conducted under 194 and 195?

A. Well, I certainly think the fact that we have had those, the opportunity to get some of those services, as the young lady that was the speech therapist here said, many of these cases have come to light. We are now aware of

problems which we were only very unscientifically aware of before because only the very obvious cases were taken care of and I think to end them now would certainly not remedy the problem, the problem being these children need services, and I just think it would be disastrous to the educational program.

Q. Now, Sister, are you a member of a Roman Catholic teaching order?

A. I am.

Q. What is the name of that order?

A. I belong to the Sisters of St. Joseph of Baden, Pennsylvania.

Q. Is it your understanding that there are legal restraints on these Acts with respect to religious inculcation?

A. Definitely.

Q. How did you come to know about these restraints?

A. Well, we have repeated in very emphatic directives given to us in regular meetings—I would say the administrative staff and the principals meet with our superintendent, John Chico and the

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coordinators of Government programs on an average of once every two months, and I don't believe we have had a meeting where this hasn't been emphasized.

Q. Now, you have said, Sister, that you are a member of a Roman Catholic teaching order, the Sisters of St. Joseph. Do the rules of your religious order require expressly or by implication that you not observe these restraints against religious inculcation under Act 194 and 195?

A. Certainly not. The rules of our community in no way interfere with our professional life. We are in many other professions besides teaching and the rules of the community don't affect that at all.

Q. Do the teachings of the Catholic Church require expressly or by implication that you do not observe those restraints?

A. Certainly not. On the contrary, I would think the rules of any religion would tell you to follow your professional integrity and if this is a regulation, your own personal and professional integrity would mean that you did observe it, and certainly not.

Q. Are you saying that there is nothing in the rules of your religious order or in the teaching of the Catholic Church that requires you to inculcate or reflect religion in the work that you do professionally?

A. On the contrary I think implied in it would be that we observe the law.

Q. Now, suppose, Sister, let's just take Act 195, and a film

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projector is loaned to a Catholic school of which you are in charge, what would inhibit you from utilizing that film projector in order to put in a Catholic religious film to show the children, this film projector having come into your possession under Act 195?

A. I wouldn't use it for that purpose.

Q. What would stop you?

A. My own personal integrity and obedience to that law. I would know that I was not to use it for that and I know a school that I was in just last week where I specifically asked the principal what she did in a case like that and she said thay used their own funds to get another projector to use for that kind of film.

Mr. Ball: I have no further questions, Your Honor.

Mr. Blewitt: None, Your Honor.

Mr. Reath: No questions, Your Honor.

Mr. Thorn: No questions, Your Honor.

Judge Gibbons: Judge Higginbotham?

Judge Higginbotham: No questions.

Judge Bechtle: Thank you, Sister.

Mr. Ball: The defendant would call as their next witness, Your Honor, Mrs. Harry Bense.

MAY BENSE, sworn.

DIRECT EXAMINATION.

By Mr. Ball:

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Q. What is your residence, Mrs. Bense?

A. I live at 331 Stanwood Street in Philadelphia.

Q. Are you married?

A. Yes, I am.

Q. What is your husband's occupation, Mrs. Bense?

A. He is a lieutenant in the Police Department.

Q. I couldn't quite hear you.

A. He is a lieutenant in the Police Department here in Philadelphia.

Q. In the City of Philadelphia? Thank you.

Do you have children?

A. Yes, I have.

Q. And what are their respective names and ages?

A. Kathleen, age 19; Danita, age 12; Johnna, 8; and Paula, 7.

Q. Now, other than as a housewife, have you had an occupation or employment?

A. Yes, I have.

Q. What would that be?

A. As a parent aid, Title I, at Archbishop Ryan Memorial Institute for the Deaf.

Q. At Archbishop Ryan Memorial Institute for the Deaf were you paid for your services as a teacher aid at that school for the deaf?

A. Yes, I was.

Q. Who paid you?

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A. I was paid. The funds came from the Federal fund.

Q. Now, what were your duties as a teacher aid under that program?

A. I would take a child from a classroom or a small group to reinforce what had already been taught to the child in a previous lesson. I would take the child out and use other materials to reinforce the previous lesson.

Q. How long were you employed at the Institute for the Deaf?

A. Two years.

Q. Are you familiar, Mrs. Bense, in general with Pennsylvania Act 195?

A. Yes, I am.

Q. Did any of your work as a teacher aid at the Institute for the Deaf relate to benefits under Act 195?

A. Yes, they did.

Q. Will you tell the court, please, in what way?

A. Well, we had these children. Deaf children do not have a language and the best way to get a language is to start with the three year olds, four year olds with visual aids, and we needed projectors and we had a movie projector that was from 1939. It wasn't quite ready to accept

a lot of films and different things that they had. We had books, materials.

Q. Are these supplied under Act 195, these books and materials and visual aids of which you speak?

A. Yes, pictures.

Q. Are these identified in any way as belonging to anyone?

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A. Yes, the Commonwealth of Pennsylvania is clearly on everything, plastic containers, anything.

Q. Did you understand both the materials and so on to be the property of the Commonwealth of Pennsylvania?

A. Yes, I do.

Q. Now, having seen Act 195 in operation what is your opinion as to a teacher aid if any of the practical effects of these Acts, of this Act?

A. The practical effects are the school had materials for the children. These books that they had were easy for the children to handle, things that came from 195, books, pictures, visual aids that the schools could not purchase without 195, and the children have a need to keep a small child, to have their interest. They might stay five to ten minutes, but with all these new aids that we were getting, you could keep the child's interest from five to ten minutes but still have other material on the same subject a little bit different to hold their interest longer so you could build up anywhere their attention span from three minutes as a small child up until 20, 25 minutes.

Q. Now, Mrs. Bense, you mentioned among your children your daughter, Johnna?

A. Right.

Q. Age 8, I believe. In thinking now again of the practical effects of Act 195 I would like to turn your attention to Johnna. In what school is she presently enrolled?

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A. Johnna presently is enrolled in St. Cecilia's School.

Q. Is that a school for exceptional children?

A. No, it is not.

Q. It is not, you say?

A. No.

Q. Would you please tell the court how Johnna came to be enrolled in St. Cecilia's School?

A. Johnna——

Q. I would like to strike the question. Excuse me, Your Honors.

Is St. Cecilia's School a school for normal children, a regular school?

A. Yes, it is.

Q. Thank you. How did she come to be enrolled in St. Cecilia's School?

A. Johnna is a deaf child. She has a 95 decible loss. She attended Archbishop Ryan Memorial Institute from the time she was two, two and a half. She is a Rubella child who is hyperactive. We sent her to Archbishop Ryan for help, to calm her down. She was very frustrated. She had no language. She could not communicate. She had normal intelligence but she just had no way of communicating with us.

We sent her there. We had problems with the child. Now, through materials that we have, we used to have to go through magazines looking for types of pictures.

Q. Where was this you had to do that?

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A. When she was in Archbishop Ryan, when she first started.

Q. Yes.

A. There were different—they had materials, but then we had to try to find other pictures for not only her but

other small children. Then all these Title I came into being. We had some of their materials to use. 195 brought more materials in. Johnna progressed to such a point that now she is able to go—within one year she progressed, the reading, and her reading increased from a first grade level. She is up to a third grade level just in one year. She was in actually like fourth, supposed to be the fourth grade.

Q. To what do you attribute this improvement, Mrs. Bense?

A. To the instructional materials that we were able to obtain.

Q. They were of such a quality?

A. High quality and enhanced her learning ability to such a—she had a burst of energy that she wanted to learn.

Judge Gibbons: I think that's the end of all the questions to you.

Mr. Reath: No questions.

Mr. Thorn: No questions.

Mr. Blewitt: No questions.

Judge Bechtle: You may step down. Thank you.

Mr. Ball: We would like to call now to the stand Mr. Daniel F. X. Powell.

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DANIEL F. X. POWELL, sworn.

DIRECT EXAMINATION.

By Mr. Ball:

Q. Mr. Powell, what is your residence, please?

A. My residence is 712 Suellen Drive in King of Prussia.

Q. Are you married, Mr. Powell?

A. Pardon?

Q. Are you married?

A. Yes, I am.

Q. I am sorry, I didn't let you state the town.

A. King of Prussia.

Q. Thank you.

You are married, sir?

A. Yes, I am.

Q. What is your age?

A. My age is 40.

Q. What is your occupation, Mr. Powell?

A. I am a unit manager with Allstate Insurance Company.

Q. Would you tell the court your present salary?

A. My present salary is $15,600 a year.

Q. Does that constitute your total family income?

A. Yes, it does.

Q. How many children do you have, Mr. Powell?

A. Four.

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Q. What are their respective names and ages?

A. Mary Ann is 13, Kathleen is 10, Daniel, Jr. is 9 and Christopher is 5.

Q. In what school is Mary Ann enrolled, Mr. Powell?

A. Mary Ann enrolled this year in Archbishop Carroll High School.

Q. Is that a religiously-affiliated school?

A. Yes, it is.

Q. What religion?

A. That's a Catholic high school.

Q. Now, to your knowledge is Mary Ann fulfilling the requirements of the State compulsory attendance requirements by her enrollment at Archbishop Carroll High School?

A. Yes, she is.

Q. Why did you select this school for Mary Ann?

A. I feel that I want my children to go to that particular school. The school I feel gives them a good education, good discipline, and by conscience, I feel that they get the religious education that I desire that they should get.

Q. Is this matter of conscience of which you speak something which you consider binding upon yourself?

A. I do personally, yes.

Q. Are you familiar with Pennsylvania Acts 194 and 195?

A. In general I am familiar with them.

Q. Is Mary Ann receiving benefits under these Acts, Mr. Powell?

[73]

A. Yes, she will be receiving and is receiving this year benefits under the Act.

Q. I wonder if you would describe to the court some of the benefits she is receiving under these Acts?

A. Under Act 194 she receives auxiliary services that are provided through the school, through the high school. These services include guidance counseling, remedial reading services—while they are at the school, she doesn't need them; they are available to her if she did—psychological, a school psychologist is available under the Act 194.

Under Act 195 she has a loan of textbooks. In addition to that, there is instructional material in the school, film strips, films, projectors, reference books which would come under Act 195.

Q. To your knowledge were these benefits available for children that enrolled at Archbishop Carroll High School for years prior to 194 and 195?

A. No, they were not.

Q. Did you as a parent there have to pay for the textbooks prior to the 1972-73 school year?

A. In prior years, they did. I did not personally because this is Mary Ann's first year, but I do know that they did have to pay for the textbooks in prior years.

Q. Do you know that as a parent of a child now enrolled at Archbishop Carroll High School for Girls?

[74]

A. Pardon?

Q. I say do you know this as a parent who has a child enrolled in Archbishop Carroll High School?

A. There is still a book payment in addition to the Acts right now.

Q. Are you aware that this lawsuit that we are here about in court today is aimed at stopping the State from providing these benefits to your child?

A. Yes, I am. That's why I am here.

Q. That is why you are here, did you say?

A. Yes.

Q. If these Acts were declared unconstitutional and the benefits of them were cut off from your child what effect would this have on their education and their welfare in your opinion?

A. In my opinion it would certainly lower the standards of the education that would be available to the children because they would not have the availability of the textbooks and the instruction material or the guidance that is available now under the Acts.

Q. How many people are dependent on your income for support, Mr. Powell?

A. Six.

Q. Do you receive any welfare money or any public assistance?

A. No, I do not.

Q. Has your cost of living changed materially in the past two

[75]

years up or down?

A. Like everybody else, it has gone up considerably.

Q. Are you a taxpayer?

A. Yes, I am.

Q. Specifically do you pay your public school taxes?

A. Yes, I do.

Q. Do you also support the non-public schools which your children attend out of your own pocket?

A. Yes, I do support them.

Q. You have testified about the benefits which your children are receiving under these Acts. Do you understand that these books and services supplied under 194 and 195 are required to be non-religious in nature?

A. Yes, I understand that.

Q. Now, it does not disturb your religious conscience as a Catholic that some elements of the instructional process in your children's school will be strictly secular or non-religious in nature?

A. In no way would this obstruct my conscience, in any way. The education itself is secular in particular. The religious education aspect is religious, but the rest of it is secular education.

Mr. Ball: I have no further questions of this witness, Your Honor.

Mr. Reath: No questions.

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Mr. Blewitt: No questions.

Mr. Thorn: No questions.

Judge Gibbons: You may step down.

The Witness: Thank you.

Mr. Ball: I will ask, is Mr. Zimmersmith present in the courtroom?

We had hoped to call Mr. Zimmersmith, but he is not here.

Judge Gibbons: Mr. Reath, is your witness ready?

Mr. Reath: Yes.

Judge Gibbons: Mr. Ball, is that your last witness?

Mr. Ball: Your Honor, we have here and I would like to offer to the court the deposition of Mr. Carmen Brutto. He was not available for trial and we took his deposition in Harrisburg, I and Mr. Thorn, on September 4th.

Judge Gibbons: Are you offering the deposition in evidence?

Mr. Ball: Yes, Your Honor.

Judge Gibbons: Has that been marked in the pre-trial order?

Mr. Ball: No, it was not, Your Honor.

Judge Gibbons: You referred to it?

Mr. Ball: We listed Mr. Brutto as a witness.

Judge Gibbons: Was it given a number?

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Mr. Ball: It was not listed as an exhibit because he was a witness.

Judge Gibbons: Mark it D-22 as an exhibit for the moment.

(Deposition of Carmen Brutto was marked Exhibit D-22 for identification.)

Judge Gibbons: I will hear Mr. Thorn.

Mr. Thorn: I have no objection to the admission, but I would like to have a copy of it.

Judge Gibbons: It will be marked in evidence.

Mr. Ball: You did not receive a copy?

Judge Gibbons: And would you furnish a copy to Mr. Thorn?

Mr. Ball: Yes, sir.

(Exhibit D-22 was received in evidence.)

Judge Gibbons: That's the deposition of whom?

Judge Bechtle: Carmen Brutto.

(Discussion off the record.)

Mr. Ball: We also offer at this time, Your Honor, all of the exhibits which are listed in the joint pre-trial order beginning with Defendant's Exhibit No. 1 and concluding, I believe, with Defendant's Exhibit No. 19.

Judge Gibbons: Mr. Thorn?

Mr. Thorn: I have no objection, but I believe D-1 is incomplete. There is an addendum which I have included in P-1

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dated March of 1973, a two-page addendum. I have some copies of it but I don't have it here right now.

Mr. Ball: With Your Honor's permission, since both parties were submitting guidelines, we will simply leave ours marked as D-1.

P-1 contains the addendum.

Would that be satisfactory?

Mr. Thorn: Satisfactory.

Judge Gibbons: P-1 is not yet in evidence.

Mr. Thorn: Well, it was supposed to be part of the stipulation, Your Honor.

Judge Bechtle: Do I take it that you had both agreed, that's why it is marked P-1 and D-1, that this was an exhibit that you both agreed upon?

Mr. Ball: Yes. Our guidelines are also marked D-1. We are happy to strike this and substitute P-1 because it has come to Mr. Thorn's attention that there are addenda to the guidelines.

Judge Gibbons: Leave it marked as in the pre-trial order and then we will admit in evidence P-1 and D-2 through D-19 listed in the pre-trial order.

Mr. Ball: Very well, Your Honor.

(Exhibits P-1, and D-2 through D-19, were received in evidence.)

Judge Gibbons: Leave complete copies with the court

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reporter and we will mark them.

We have previously admitted D-20, 21 and 22.

Judge Bechtle: I think the thing to do now, Mr. Thorn, is to give the court reporter one to mark as the official court exhibit copy and mark that P-1.

Mr. Thorn: I understand.

Judge Bechtle: That's all right. And then if there are additional copies, it would be helpful.

Mr. Thorn: I see. Just leave one?

Judge Bechtle: Just leave one for the court reporter's official record.

Mr. Ball: Then we had D-1 through D-19.

Judge Bechtle: Yes, fine.

Judge Gibbons: Mr. Ball, do you have another witness or are we ready for Mr. Reath?

Mr. Ball: We have no more witnesses.

Mr. Reath: Mr. Jarvis?

JOHN JARVIS, sworn.

DIRECT EXAMINATION.

By Mr. Reath:

Q. Mr. Jarvis, where do you reside?

A. 230 North Charlotte Street, Lancaster, Pennsylvania.

Q. And what is your relationship with the Lancaster Country Day School?

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A. I am the head master of that school.

Q. And for how many years have you been?

A. I believe I am in my ninth year now.

Q. And tell the court if you would, please, very briefly with respect to your professional qualifications and educational background.

A. I graduated from the University of St. Anders, Scotland, and then immigrated to this country and attended the University of Pennsylvania where I got a Master's in Education Degree. I have taught in the Philadelphia area for the Episcopal Academy for 16 years until I went to Lancaster as the head master.

Q. And tell us what is the enrollment of the Lancaster Country Day School?

A. We have 300 students, a co-educational school.

Q. And do you also have scholarship students in addition to full tuition paying students?

A. We feel that this is a very important element in the school, that we should have a cross section, and we have 15 per cent of our students on scholarship.

Q. And what does that amount to in terms of dollar aid?

A. About $45,000.

Q. And could you just characterize for us the nature of the scholarship, of the students receiving scholarship aid?

A. Based on merit and need, and we have a cross section of race, color and creed that I think we can be very proud of.

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Q. Now, as the head master of the Lancaster Country Day School, did you apply for and did you receive benefits

during the school year 1972-73 under Pennsylvania Acts 194 and 195?

A. Yes. Under 194 we were able to apply and were greatly assisted by improving the quality of the testing program which we had not been able to afford up to that time. That was under 194.

Under 195 we were able to apply on loan certain equipment that we had not been able to afford prior to that time and has been of great benefit to the individual students in the school.

Q. And did you or persons under your control attend and participate in meetings with the Intermediate Unit with respect to the allocation of funds, the administration of funds, under Acts 194 and 195?

A. I have not attended these meetings but the assistant head master did. We have had excellent cooperation with the Intermediate Unit 13 which is Lancaster and Lebanon. They have been very helpful, and we have had many meetings on how the program should be run, what we can do, and we have tried to follow their instructions precisely.

Q. And over what period of time were these various planning meetings held?

A. They began, I would say, almost immediately after the Act was passed, some time in 1972, but there was a period of no one knew what the organization was going to be so we really had to get

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into 1973 before anything really started.

Q. But there were meetings, were there, in 1973 during the course of the school year?

A. Yes.

Q. At which time plans were made?

A. Yes.

Q. For the implementation of the program to be carried out this year?

A. Yes.

Q. Now, with respect to the school year '73-'74, have you worked out with the Intermediate Unit plans for certain auxiliary services to be made available to the students attending your school?

A. This Act 194 I think is a very valuable and important educational asset. Under this Act, now, we can obtain services that we couldn't obtain before, and we have never been able to afford a full-time remedial reading teacher, and in deciding what we should do, we felt that this would be of the greatest benefit to the students, and we have now made arrangements with the Intermediate Unit and we have hired this individual who comes in from 11:00 to 3:00 every day in the school year, and though school has only started two days, we already see real pluses in this situation. We can reach kids that we couldn't reach before that needed this kind of thing.

Q. Now, this particular teacher as I understand it is hired by and is an employee of the Intermediate Unit?

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A. That is correct.

Q. And just so that we have it clear on the record, perhaps you would explain to the members of the court what the Intermediate Unit is, what it is and what its function is in the administration of the entire public school system?

A. This is a combination of Lancaster and Lebanon County schools that are being coordinated together to provide better quality of services and a better range of services for all the students, children in that two-county area, and they have this special staff of Intermediate Unit which provides a series of services.

Q. And you are referring now, of course, to the public school system?

A. That is correct. We have never been involved with Intermediate Unit 13 until really the setting up of this Act.

Q. Now, are there benefits that were previously available to the public schools under the jurisdiction of Intermediate Unit No. 13 which as a result of Acts 194 and 195 are now also available to you as a non-public school?

A. Yes. We have always looked with great envy on the great range in quality of the public school library, film library, and we have contacted public schools many times before this and we have been told we could not participate in this library because we were not a public school. Now through 194 we are able to use the Lancaster-Lebanon Intermediate Unit Film Library, and I believe you

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are holding a copy of the catalog there which is a tremendous educational benefit, potential benefit, to our students.

Mr. Reath: At this time, if Your Honor please—and I have shown this to opposing counsel—I would like to have this marked as the defendant's next number exhibit which would be D-23.

(Instructional Materials Services Film Catalog, Lancaster-Lebanon Intermediate Unit was marked Exhibit D-23 for identification.)

By Mr. Reath:

Q. And I show you the exhibit marked for identification as D-23.

A. That's right.

Q. And would you hold that up to the members of the court and explain what that is?

A. This is a film catalog for the Lancaster-Lebanon Intermediate Unit and it gives a full list under topics of films that can be obtained by this unit for use in the classroom by the individual teacher and it covers a wide range of subject matter from art to history to mathematics to science.

Q. And these are materials that have heretofore been always available in the public schools but now under Acts 194 and 195 are available to you on the same basis?

A. Yes, even if we had been able to obtain these films before, which we were not, I mean, we just couldn't do it, we could not have afforded the charge per pupil which we now can receive under

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Act 194.

Mr. Reath: I ask that the next document be marked as Defendant's Exhibit D-24 which is another publication of the Lancaster-Lebanon Intermediate Unit entitled "Intermedia Workshops for Teachers," Volume II, No. 1, dated September 1, 1973.

("Intermedia" was marked Exhibit D-24 for identification.)

By Mr. Reath:

Q. And I show you this pamphlet marked D-24 which I have already identified. Would you hold that up to the members of the court and explain what that is and what services are available to you now that were not heretofore which were also available to the public schools in your area?

A. Well, this has just been an opening up of certain opportunities for us that we really have not had before. There are a series of very excellent workshops being planned by Lancaster-Lebanon Intermediate Unit in which

we are invited to participate. Not only are we invited, but secondly, we now would be able to apply under Act 194 for funds to cover the expenses of these workshops.

Judge Bechtle: They are for teachers? Is that for teachers?

The Witness: That's for teachers, yes.

By Mr. Reath:

Q. Now, Mr. Jarvis, with respect to the program that you have set up for remedial reading, and with respect to these other benefits

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that you are now eligible to receive and for which you now have commitments from the Intermediate Unit, would you explain to the court what effect these would have on the education of the children committed to your charge and your school if the court were to prevent the Commonwealth from making available to the Intermediate Units the money which would be used to pay for these benefits?

A. Yes. I think we would be hit hardest, our kids would be hit hardest, because they would be individually affected by the loss of this remedial reading teaching and I would be I think very concerned with the educational results of losing that trained personnel that we have never had before.

In terms of some of the other parts of the program, there would be equipment that we would be hoping for, certain science equipment that we had not been able to get before, there would be certain books that we had hoped—individual teachers had hoped—would be used in dealing with the individual students, and I would say that I think the kids would definitely suffer.

Q. And would you be able in your existing school budget to absorb those costs and to continue them in some other fashion?

A. Our school budget is set up so that it balances if we can through annual giving raise something like $36,000, so we automatically start the year with a deficit and we have to go out to the community on the basis of what we do for the community to ask for additional support, so we have no way in which these

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services could be added in on our own.

Mr. Reath: Thank you, Mr. Jarvis. I have no other questions.

Judge Gibbons: Any cross-examination?

Mr. Thorn: No, no questions.

Mr. Ball: No questions, Your Honor.

By Judge Bechtle:

Q. What grade levels does your school encompass?

A. We go from nursery to 12th grade.

Q. And are all your students required to conform to the Commonwealth of Pennsylvania compulsory attendance laws?

A. Absolutely, sir.

Judge Bechtle: That's all I have.

Judge Gibbons: Mr. Reath, do you offer Exhibits D-23 and D-24?

Mr. Reath: Yes, sir, I do.

Judge Gibbons: Mr. Thorn?

Mr. Thorn: No objection.

Mr. Reath: And at this time also, if Your Honor please, I would merely like to make a formal offer for the record of the documents C-1 through C-4 which appear at Page 5 of the pre-trial order. Copies of those have already been filed with the court and referred to in this order, but I make a formal offer of them.

Judge Gibbons: Mr. Thorn?

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Mr. Thorn: No objection.

The Court: All right, D-23 and 24 will be received in evidence, and C-1 through C-4, listed on Page 5 of the pre-trial order, will be received in evidence.

(Exhibits D-23 and 24 and C-1 through C-4 were received in evidence.)

Judge Gibbons: Be sure that the court reporter has the court filed copies of C-1 through 4.

Mr. Reath: Yes. Mrs. Elliott will arrange for that as soon as the record is closed, Your Honor.

Judge Gibbons: Any other witnesses?
The defense rests?
Any rebuttal?

Mr. Thorn: No, Your Honor.

• • •

DEPOSITION OF CARMEN BRUTTO.

Verbatim report of deposition taken at the offices of Ball & Skelly, 127 State Street, Harrisburg, Pennsylvania, on Tuesday,

September 4, 1973

9:00 a.m.

APPEARANCES:

WILLIAM THORN, ESQUIRE
12th Floor, Packard Building
Philadelphia, Pennsylvania 19102
For—The Plaintiffs

BALL & SKELLY
127 State Street
Harrisburg, Pennsylvania 17101

By: WILLIAM B. BALL, ESQUIRE
and
JOSEPH G. SKELLY, ESQUIRE
Intervenor for Jose Diaz, et al.

CERTIFICATE.

I, Rita Hallock, a Notary Public duly commissioned and qualified in and for the Commonwealth of Pennsylvania, do hereby certify that pursuant to the notice there came before me at 9:00 a.m. on Tuesday, September 4, 1973, at the offices of Ball & Skelly, 127 State Street, Harrisburg, Pennsylvania, the within-named person who was sworn by me to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and the examination reduced to writing under my supervision; that the deposition is a true record of the testimony given by the witness, and that the witness waived signature thereto as shown in the stipulation herewith.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties to the action in which this deposition was taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in this action.

In testimony whereof, I have hereunto subscribed my hand and affixed my seal of office this 5th day of September 1973.

My Commission Expires:
May 30, 1977

(SEAL)

RITA HALLOCK,
Rita Hallock,
Notary Public

STIPULATION.

It is hereby stipulated by and between counsel for the respective parties that signing, sealing, certification and filing are waived, and that all objections, except as to the form of the questions, are reserved to the time of trial.

[5]

CARMEN BRUTTO, called as a witness, was duly sworn and testified as follows:

DIRECT EXAMINATION.

By Mr. Ball:

Q. State your name and address.

A. Carmen Brutto, 33 Circle Place, Camp Hill, Pennsylvania.

Q. Mr. Brutto, what is your occupation?

A. I am a reporter for the Patriot, Harrisburg Patriot, acting as a legislative correspondent.

Q. How long have you been in the field of journalism?

A. Since graduating from Temple University in 1950, I went from Temple to the Shenandoah Evening Herald, worked there until 1954. Then I came with the Patriot-News Company in 1954, the York Bureau Chief, worked in York for three years, came to Harrisburg in '57, worked as an assistant Sunday editor for about a year, and worked on the Evening News copy desk. Then I went to general assignment reporting with the Evening News. In 1961, I was assigned to bill coverage.

Q. Mr. Brutto, do you have membership in any professional organizations?

A. I am the president of the Pennsylvania Legislative

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Correspondents Association.

Q. Have you received any awards in the field of journalism?

A. Yes. Since I have been on the Hill, I have won the Keystone Press Award, which is an annual event by the Pennsylvania Newspaper Publishers Association.

Q. That was in what year?

A. It was around '63.

Q. I wonder if you would describe the nature of your work as chief legislative correspondent for the Patriot.

A. My work is confined strictly to legislative governmental work. I cover the legislature when it is in session, stick around the Hill when it is not in session, follow political activities, do election campaigns, any governmental action—cover the Governor when he is acting, or all—not all the legislative hearings, but the more significant legislative hearings that go on.

Q. Do you follow the main items of legislation?

A. Yes. We, on the Hill, are basically divided. The Capitol Hill reporters are divided into the wires and the specials. The wires cover virtually everything that goes on. The specials—they are the ones who work for specific newspapers—Philadelphia newspapers, Pittsburgh, and Harris-

[7]

burg papers.

You follow the major legislation, or those pieces of legislation which your area is interested in.

Q. In connection with this, may we infer then that you are aware of legislation which creates major controversy?

A. Yes. As a matter of fact, one of the jobs I have, when there is a session on, is preparing something called the status of bills, which is a sort of a calendar of major bills and where they are in the Legislature and what is happening to them, and also, a weekly report on roll calls. We pretty well know what is passing and what is pending.

Q. In your work, would you say you are in contact with the statewide sentiment, state pulse, so to speak, currents and sentiments?

Mr. Thorn: Excuse me. The usual stipulation, I assume, covers the fact that objections as to relevancy are waived until trial.

Mr. Ball: Surely.

The Witness: I work with a combination of legislators and other newspaper correspondents. Like I said, we have Philadelphia and Pittsburgh newspapers, and some from other cities that come in and ask questions, and we get in contact with them.

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I do work for other newspapers also, and you get a pretty good reading of what is going on around the state, what the legislators feel are important issues, what their people are for and against.

By Mr. Ball:

Q. While the so-called acts of 1972, namely Acts 194 and 195, relating to textbooks and auxiliary services for nonpublic school children were before the General Assembly, did you observe division of any sort along political lines in connection with these measures?

A. Let me say, first, when you called me about some testimony about Act 195, I thought you were talking about the Public Employees Relations Law, which is Act 195 of 1970, and any reference to a law by an act No. 195 generally refers, or is accepted to mean that piece of legislation, because it is more commonly referred to as that.

On this other thing, there really wasn't anything significant in the——

Q. Was there a division along political lines?

A. What do you mean, "along political lines"? It had support on both sides of the aisle.

Q. But did you observe any religious fighting among

[9]

the legislators over these bills?

A. I would have to say that the religious reference to legislation such as this has decreased since the first school bussing in 1963.

Q. But with respect to these bills——

A. With respect to these bills, as I recall, the only challenges would be on constitutional grounds, people questioning its constitutionality. The religious aspects are not usually brought up any more.

Q. In the case of other bills on the Hill, have you been aware of, for example, bus loads of demonstrators coming to the Capitol?

A. Oh, yes, there is a lot of legislation which brings busloads here.

Q. Picketing and demonstrating on the Capitol grounds?

A. You have such things as the insurance premium tax, school teacher raises, tax on cigars brought people. You have welfare bringing mobs of people, the failure of state employees to get their pay two months ago or so.

Q. There are demonstrations, handing out of inflammatory handbills, and so on?

A. There is very little handbill handing out. It is more on a sign basis.

[10]

Q. Signs?

A. You have more signs. Very seldom do you see handbills of any kind.

Q. Did you observe or hear of any such events, picketing, demonstrations, busloads of people, and handing out or parading with signs and so on, in connection with these two acts?

A. No, I wasn't aware of any.

Q. Did you see any sort of activity in connection with these bills which, as a seasoned political observer, would constitute a threat to the normal political process?

A. No.

Q. What would you say were the issues of great urgency which were before the General Assembly in the Spring and Summer of 1972, the top key issues?

A. Well, the key issue in any Spring is the budget. Last year, there really wasn't any—there were some drug bills before the Legislature, but they did quit around the 22nd of June, once they passed the budget. Then they took their Summer recess. They got called back in August, but there was no——

Q. The budget then——

A. The budget takes precedence. Usually, nothing

[11]

new until the budget news.

Q. Now, as a seasoned political observer, did it appear to you that the pending of these two acts we are talking about in the General Assembly tended to obscure these other issues of great urgency, such as the budget?

A. No. Since this bill required an appropriation, it wouldn't be likely to move until the budget moved anyhow, and I don't recall any bill being held up because of this pending—or any other bill—generally, the budget is the thing that holds up most of the legislation.

Q. Now obviously issues of great importance which are of a continuing nature that the Commonwealth, General Assembly, worries about from year to year, problems facing our Commonwealth—did the pendency of these two bills we are talking about, Mr. Brutto, appear to you to divert attention from these myriad issues and problems that are confronting our state government?

A. No.

Q. Did the pendency of these bills indicate to you that political fragmentation and divisiveness on religious lines thus become intensified?

A. No.

Mr. Ball: Mr. Skelly, do you have any questions?

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Mr. Skelly: No.

Mr. Ball: That is all for direct examination.

CROSS-EXAMINATION.

By Mr. Thorn:

Q. Mr. Brutto, what is your religious affiliation?

A. Catholic.

Q. Roman Catholic?

A. Yes.

Mr. Ball: We will object.

Mr. Thorn: I have no further questions. Thank you very much.

Mr. Ball: Well, we will object to the raising of the question of Mr. Brutto's religion by Mr. Thorn, we will ask Mr. Brutto, as a sworn witness, whether the fact of his religion has in any way influenced the answers which he has given to questions which he was sworn to answer truthfully this morning.

The Witness: May I make a statement?

No, because the fact that I am a Roman Catholic—I gain nothing. I would gain nothing from this legislation. I have got four children; none of them are in Catholic schools. I have got two children in college, both in—well, one is at

[13]

Dickinson, and one is at Ohio State, which are non-Catholic schools. My other two children are in the

public school system, so the passage of this legislation or similar legislation would in no way affect me.

Mr. Ball: Thank you.

Mr. Thorn: Do you approve of state aid to religious education?

Mr. Ball: We will object to it again.

The Witness: Not in all the forms which it has been advocated, no.

Mr. Thorn: Do you approve of these two bills?

The Witness: The bills have merit, yes.

Mr. Thorn: So, you do approve of them?

The Witness: Yes.

Mr. Thorn: No further questions.

Mr. Ball: I have no further questions.

(The deposition was concluded at 9:40 a.m.)

I hereby certify that the testimony taken by me at the offices of Ball & Skelly, 127 State Street, Harrisburg, Pennsylvania, on the within cause, is fully and accurately indicated in my notes and that this is a true and correct transcript of same.

RITA HALLOCK,
Rita Hallock,
Reporter.

The opinions of the court below are printed in the Jurisdictional Statement as follows:

Majority Opinion	p. 1a
Dissenting Opinion	p. 53a

Supreme Court, U. S.
FILED
JUN 26 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1765

SYLVIA MEEK, et al.,

Appellants,

v.

JOHN C. PITTENGER, et al.,

Appellees,

and

JOSE DIAZ, et al.,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

MOTION TO DISMISS OR AFFIRM.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. .

SYLVIA MEEK, ET AL.,

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v.

JOHN C. PITTENGER, ET AL.,

Appellees,

and

JOSE DIAZ, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO DISMISS OR AFFIRM.

Pursuant to Rule 16 of the Rules of this Court, Appellees Jose Diaz and Enilda Diaz, his wife, on their own behalf and as guardians of their minor children, Dalila, Jose, Jr., and Sergio Diaz; William Zimmerspitz and Nancy Zimmerspitz, his wife, on their own behalf and as guardians of their minor child, Rochelle Zimmerspitz; Thomas J. Hassall and Marie Hassall, his wife, on their own behalf and as guardians of their minor child, Patricia Anne; Daniel F. X. Powell and Anna T. Powell, his wife, on their own behalf and as guardians of their minor children, Kathleen A. and Daniel F. X., Jr.; Seth W. Watson, Jr. and Anne P. Watson, his wife, on their own behalf and as guardians of their minor child, Ellen P., move to dismiss this appeal, or, in the alternative, to affirm the judgment below, on the ground that it presents no substantial federal question warranting plenary review by this Court.

COUNTER-STATEMENT OF THE CASE.

Under Act 194, upheld by the court below, the Commonwealth provides certain defined "auxiliary" services (*e.g.*, testing, speech and hearing, psychological, etc.), on an individualized basis, to specific children found to be in need of educational services beyond those available in a general instructional program. These services are furnished directly to the child at the school in which he must meet compulsory attendance requirements.

Under Act 195 (also upheld by the court below) the Commonwealth loans textbooks, acceptable for public schools, to nonpublic school children. Under this Act it also loans to nonpublic schools instructional materials and instructional equipment useful to the education of these children. The instructional materials must be secular, neutral and non-ideological in nature. The instructional equipment also must be and, in addition, as the lower court has ruled, such that, "from its nature cannot be readily diverted to religious purposes."

The Appellants in their Complaint, attacked both Acts as violative on the face and as applied, of the Free Exercise and Establishment Clauses. The court below upheld both Acts, enjoining, however, the loan of such instructional equipment as is divertible to religious purposes.

The case comes to this Honorable Court with an ample evidentiary record. Thirty-one exhibits and the testimony of eleven witnesses (including Commonwealth officials, auxiliary service personnel, and parents) were received in evidence.

On June 17, 1974, this Court affirmed the decision of the United States District Court for the District of New Jersey in *Marburger v. Public Funds for Public Schools of New Jersey,* No. 73-120. The Pennsylvania statutes here involved are readily distinguishable from the invalid New

Jersey statute. The latter was essentially a parent cash reimbursement enactment and therefore invalid under the *Nyquist-Sloan* decisions of this Court. There was no evidentiary trial in *Marburger,* and the court therein was forced to resort to assumptions respecting constitutionally important facts. The extensive trial record in the Pennsylvania case is of critical constitutional significance on the issues of primary effect and entanglement. The opinion of the District Court in the Pennsylvania case (also coming from a court of the Third Circuit) was subsequent to that in *Marburger* and upheld the Pennsylvania statutes. The trial record in the Pennsylvania case shows that the court herein was completely aware of the statute and lack of record in *Marburger.* The opinion of that court, however, does not even refer to *Marburger,* while the partially dissenting opinion makes only the barest reference to it, thus evidencing a conclusion that, in the mind of the District Court, the *Marburger* statute bore little or no relationship to the statutes involved in the instant case.

QUESTIONS PRESENTED.

This appeal presents the following questions:

1. Does Act 194, on its face or as applied, violate the Establishment Clause of the First Amendment to the Constitution of the United States?

2. Does Act 195, on its face or as applied, violate the Establishment Clause of the First Amendment to the Constitution of the United States through the loan to nonpublic school children of textbooks, acceptable for use in public schools?

3. Does Act 195, on its face or as applied, violate the Establishment Clause of the First Amendment to the Constitution of the United States through loans to nonpublic schools of secular, neutral, nonideological instructional materials, useful for the education of pupils there enrolled?

4. Does Act 195, on its face or as applied, violate the Establishment Clause of the First Amendment to the Constitution of the United States through loans to nonpublic schools of secular, neutral, nonideological instructional equipment, of benefit to the instruction of nonpublic school children, and which from its nature cannot be readily diverted to religious purposes?

ARGUMENT.

I. This Appeal Presents No Substantial Federal Question Under the Establishment Clause .

The District Court was patently correct in its holding Act 194 (auxiliary services) to have no primary effect advancing religion, the primary effect of these programs instead being one of "meeting the state's primary objective of assuring that individual students receive those individualized services, outside the general program of instruction of their school, necessary for their individual progress in learning." *Meek v. Pittenger,* — F. Supp. — (E. D. Pa. 1974). See Appendix to Jurisdictional Statement * 36a. As to Appellants' contention that Act 194 calls for "excessive entanglements" between the state and religious schools, the District Court was likewise correct in stating:

> "From these cases [decisions of the Supreme Court on the 'entanglement' question] it seems clear to us that a decision on the entanglement criterion will in most if not all cases require a factual inquiry rather than a resort to examination of the face of the statutory issue or to judicial notice about how it may be expected to operate." *Id.* at —. Appendix 24a.

A full factual inquiry has taken place in this case, and the court below, with a factual record to go on, rather than supposition, felt itself compelled to conclude that Act 194 does not involve the Commonwealth in an impermissible entanglement with religion. See Appendix 36a-40a.

Likewise the District Court was obviously correct in its holding that "the textbook loan provisions of Act 195 are for First Amendment purposes indistinguishable from

* Hereinafter cited as "Appendix".

the 1965 New York textbook loan statute upheld in *Board of Education v. Allen* . . ." *Id.* at —. Appendix 40a. Nor can any real constitutional issue be raised with respect to the instructional materials provision of the Act. As the court stated:

> "No evidence has been presented from which we may infer that secular, neutral, nonideological instructional materials such as audio-visual materials, intended for group rather than individual use, are any more susceptible of diversion to a religious purpose than are textbooks. The expenditure is for a clearly identifiable secular purpose. The school is the custodian out of practical necessity because such materials are designed for group or multi-student use. . . . No greater entanglement is required by the operation of the instructional materials loan program than by the textbook loan program." *Id.* at —. Appendix 45a.

Logically, the District Court treated instructional equipment, provided under Act 195, precisely as it had treated instructional materials—limited, however, to equipment "which from its nature is incapable of diversion to a religious purpose . . ." *Id.* at —. Appendix 46a. This part of the decision below, upholding the loan of self-policing instructional equipment gives rise to no substantial federal question but rests, rather, upon the settled pronouncements of the Supreme Court of the United States.

Finally, although Appellants, in Paragraph 11 of their Complaint, raised the supposed issue of "political fragmentation and divisiveness along religious lines", they do not appear to press it here. The Appellees, upon trial, presented expert testimony on the real-life situation in Pennsylvania surrounding the passage of Acts 194 and 195, showing that *no* such speculative aberrations had taken place.

The Appellants introduced no evidence in support of their allegation and, as the court below rightly concluded, "it simply has not been proven." *Id.* at —. Appendix 50a.

CONCLUSION.

Under the settled principles laid down by this Court in cases involving the Establishment Clause, it is respectfully submitted that this appeal presents no substantial federal question. The Opinion and the Judgment of the court below should be affirmed or, in the alternative, the appeal should be dismissed.

Dated June 17, 1974.

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In the Supreme Court of the United States

October Term, 1973
No. 1765

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
Appellants

v.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,
Appellees

and

JOSE DIAZ and ENILDA DIAZ, His Wife et al.,
Intervening Parties Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

MOTION TO DISMISS OR AFFIRM OF APPELLEES PITTENGER AND SLOAN

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 1765

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,

Appellants

v.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,

Appellees

and

JOSE DIAZ and ENILDA DIAZ, His Wife et al.,

Intervening Parties Appellees

MOTION TO DISMISS OR AFFIRM OF APPELLEES PITTENGER AND SLOAN

On Appeal From the United States District Court for the Eastern District of Pennsylvania

Pursuant to Rule 16 of the Rules of this Court, the appellees, John C. Pittenger and Grace M. Sloan move to dismiss the appeal or to affirm the judgment of the Court below on the ground that the questions upon which review is sought have been rendered so unsubstantial by the well-reasoned opinion of the District Court that no further review by this Court is necessary.

STATEMENT OF THE CASE

This appeal challenges the constitutionality of two amendments to the Public School Code of 1949, Pa. Stat. tit. 24, Sections 1-101 et seq., on the ground that these amendments violate the Establishment Clause of the First Amendment. The Public School Code embodies a comprehensive scheme for educating all children of elementary and secondary school age. The specific statutes challenged in this proceeding are Act 194 of July 12, 1972, Pa. Stat. tit. 24, Section 9-972 (Supp. 1974) (hereinafter, "Act 194") and Act 195 of July 12, 1972, Pa. Stat. tit. 24, Section 9-972 (hereinafter, "Act 195").

Act 194 (Jurisdictional Statement at 108a) states that the Commonwealth will provide specific "auxiliary services" on an individual basis, to those nonpublic school children who require services beyond those available as part of a general instructional program. All the "auxiliary services" authorized by Act 194 are presently provided for public school children. Act 195 (Jurisdictional Statement at 111a) authorizes the loan to nonpublic school children of textbooks which are acceptable for use in public schools. In addition, Act 195 also authorizes the loan of such instructional equipment and materials as are useful to the education of such children and which are "presently or hereafter provided for public school children" (Jurisdictional Statement at 113a, 114a). The instructional materials and equipment must be secular, neutral and non-ideological in nature.

After a full evidentiary hearing, which detailed the manner in which these state programs operate, a three judge District Court upheld the constitutionality of Act 194. The Court also upheld the constitutionality of Act 195 with the limitation that the only equipment which could be loaned is equipment which "from its nature cannot be readily diverted to religious purposes" (Final Order, Jurisdictional Statement at 102a-103a).

ARGUMENT

This Appeal Presents No Substantial Federal Question

1. The District Court Opinion

The majority opinion of the three judge court in this case contains such an excellent analysis of all the relevant decisions of this Court in the Establishment Clause area, and the opinion so carefully applies the principles gleaned from that analysis to the Pennsylvania programs challenged in this case that the District Court's opinion makes further review by this Court of the questions raised in this case unnecessary.

In the last few years, this Court has spoken often on the scope of the Establishment Clause, especially in the area of education. All parties to this case would freely admit that with the exception of *Everson v. Board of Education*, 330 U.S. 1 (1947), all of the relevant pronouncements of this Court which bear on the questions raised in this case have been rendered within the last six years. "As a result of these decisions and opinions, it may no longer be said that the Religion Clauses are free of 'entangling' precedents" *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 761 (1973). This Court's precedents, of course, are controlling. Moreover, though it is certainly this Court's first task to resolve the specific case before it, it is equally true that in deciding cases this Court has articu-

lated those principles—those "cumulative criteria"—which should govern related cases. The majority opinion of the District Court has drawn exclusively upon this Court's opinions in the Establishment Clause area in determining that the Pennsylvania programs comply with that constitutional mandate.[1]

The District Court's Opinion announces no new rule of law in the Establishment Clause area. It has

[1] This Court summarily affirmed the judgment of the United States District Court for the District of New Jersey in *Marburger v. Public Funds for Public Schools of New Jersey*, No. 73-120, 42 U.S.L.W. (U.S. June 17, 1974). The New Jersey programs invalidated in *Marburger* are readily distinguishable from the Pennsylvania programs challenged in this proceeding. The reimbursement features of the New Jersey Act are, of course, akin to the New York reimbursement proposal invalidated in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) whereas Acts 194 and 195, when read *in pari materia* with other provisions of the Public School Code, are remarkably akin to the uniform textbook loan program found constitutional in *Board of Education v. Allen*, 392 U.S. 236 (1968). As to the relative weight to be given to this Court's summary affirmances, see generally *Edelman v. Jordan*, 94 S. Ct. 1347, 1359-60 (1974).

The limited precedential value of *Marburger* is underscored by the fact that the majority in the instant case, well aware of the lower court's decision, makes no reference to it in its opinion, and the dissent refers to it only twice and in passing (Dissenting Opinion, Jurisdictional Statement at 64a, 68a).

The precedential value of *Marburger* is further dissipated by this Court's reservation of the Establishment Clause issue in *Wheeler v. Barrera*, 42 U.S.L.W. 4877 (U.S. June 10, 1974), a decision rendered one week before the summary affirmance in *Marburger*, and a case dealing with a federal aid to education program similar in many respects to the Pennsylvania statutes challenged in this appeal.

simply applied existing rules gained from a review of this Court's decisions to State programs aimed at equalizing educational services for the children of Pennsylvania. Moreover, in concluding that this Court's decisions do not render Acts 194 and 195 unconstitutional, this Court had the benefit of a record which fully presented the manner in which the State programs operate. This, of course, was essential since it assured that the District Court had a firm grasp of the functioning of these programs and their self-limiting characteristics.[2]

---

2. *The Jurisdictional Statement*

Appellants' Jurisdictional Statement treats each of the four aspects of Acts 194 and 195 separately.[3] That of course, is the only manner in which to properly review

[2] "The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the court. Usually it requires a careful evaluation of the facts of the particular case. . . . A federal court does not sit to render a decision on hypothetical facts . . ." *Wheeler v. Barrera*, 42 U.S.L.W. 4877, 4885 (U.S. June 10, 1974).

[3] Although appellants make some statement about viewing the statutes as a whole, it is difficult to see what point, if any, they are attempting to make by that statement. In any event, the most surface reading of the cases cited in support of the proposition that the Acts should be viewed as a whole will indicate that they clearly stand for a directly contrary proposition. Moreover, this Court has invariably given separate treatment to distinct and separate aspects of a statute in determining whether each part of the statute complies with the Constitution. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

the distinct and separate aspects of the four state programs. It is necessary to briefly review the arguments raised in the Jurisdictional Statement in order to show how the disposition of these arguments by the District Court's opinion have rendered them unsubstantial.[4]

Auxiliary Services:

Appellant first challenges the Auxiliary Service program. They contend that that program is open ended and in doing so place chief reliance on *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Moreover, they predicate their argument on a utopian portrait of a school system wherein "Every school, as part of its normal operations, provides instructional services to below grade level students to bring them up to grade level and to assist them to perform at the grade level for their age and potential" (Jurisdictional Statement at 12). Appellants thus argue that such services are nothing more than a normal part of a school's operating budget. This argument is facially unsound. Appellants are, in effect, saying that there is no such thing as an "auxiliary" service in education. The record simply does not support such a bold assertion, nor does it support the specific assertion that the providing of individual assistance to children requiring services beyond that available in a general instructional program is part of the normal operating costs of a school. Majority Opinion, Jurisdictional Statement at 30a-35a.

Appellant argues that the Auxiliary Services program is so open ended that it would countenance the

[4] All of these arguments have previously been made to the District Court.

State furnishing teachers for the general instructional programs of the nonpublic schools. This argument—without a line of record support—is adequately dealt with in the District Court's opinion (Jurisdictional Statement at 37a). However, appellant's reliance on *Lemon v. Kurtzman,* 403 U.S. 602 (1971), as supporting their view that the Auxiliary Service program is invalid does warrant a brief rebuttal. The very essence of the *Lemon* decision was the recognition that the State could not adequately insure that parochial school teachers were not inculcating religion unless the State had a comprehensive system of surveillance which would violate the entanglement principle of the Establishment Clause:

> ". . . The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. . . .
>
> ". . . We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. . . ." *Id.* at 618.

Act No. 194, on the other hand, is administered by public employees only. Moreover, in the hiring of those public employees, the State is bound by the mandate of Pa. Stat. tit. 24, Section 1-108:

> "No religious or political test or qualification shall be required of any director, visitor, superintendent, teacher, or other officer, appointee, or employe in the public schools of this Commonwealth."

The surveillance requirement found necessary in *Lemon* to protect against the deliberate or unintentional inculcation of religion by teachers in the employ of religious schools is obviated entirely by the simple fact that public employees—and only public employees—administer Act 195:

> "The notion that by setting foot inside a sectarian school a professional therapist or counsellor will succumb to sectarianization of his or her professional work is not supported by any evidence" (Majority Opinion, Jurisdictional Statement at 39a.)

The District Court's Opinion has so fully and adequately dealt with the challenges raised against Act 194 as to render those challenges unsubstantial and a further review of them by this Court unnecessary.

Textbooks:

Appellants' challenge to the textbook provision of Act 195 is, of course, nothing more than an attempt to relitigate this Court's decision of six years ago in *Board of Education v. Allen,* 392 U.S. 236 (1968). That recent decision must control, as the District Court correctly concluded. Appellants' attempts to distinguish *Allen* are unavailing.

Instructional Materials:

Appellant challenges the constitutionality of the Instructional Materials provision of Act 195 because, they say, it goes beyond the permissible bounds of *Allen.* The materials countenanced by the Guidelines to Act 195 are indistinguishable from textbooks as teaching tools. Their self-policing characteristics are apparent.

This Court only recently observed in reaffirming the principles of the *Allen* decision that "a textbook's content is ascertainable . . ." *Lemon v. Kurtzman,* 403 U.S. 602, 617 (1971). The same is equally true of the instructional materials authorized to be loaned pursuant to Act 195. Majority Opinion, Jurisdictional Statement at 45a.

Instructional Equipment:

The instructional equipment which may be loaned pursuant to Act 195, limited as it is to equipment which "from its nature cannot be readily diverted to religious purposes" (Final Order, Jurisdictional Statement at 102a-103a) does not infringe upon the Establishment Clause. Moreover, the District Court's Opinion, distinguishing between such self-policing equipment and equipment which can be diverted to religious purposes, and finding the former permissible and the latter impermissible follows closley the course this Court followed in *Tilton v. Richardson,* 403 U.S. 672, 682-84 (1971).

The equipment which can now be loaned pursuant to the Act is self-policing by any reasonable standard. The examples hypotheticated by appellants (Jurisdictional Statement at 15) of the manner in which this equipment can be put to a religious use border on the fantastic. Moreover, they suggest a conscious design to violate the law which is unsupported by the record:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." *Tilton v. Richardson,* supra, 403 U.S. at 679.

The District Court properly concluded that the loan of such equipment, self-limiting in nature, does not infringe upon the Establishment Clause.

CONCLUSION

Appellees respectfully submit that the questions upon which this cause depend are so unsubstantial as not to need further argument, and appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the United States District Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1765

SYLVIA MEEK, *et al.*, *Appellants*

v.

JOHN C. PITTINGER, *et al.*, *Appellees*

and

JOSE DIAZ, *et al.*,

Appellees

and

JOHN P. CHESIK, on his own behalf and on behalf of his daughter, EMILY, et al.,

Appellees

MOTION TO AFFIRM

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

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IN THE

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SYLVIA MEEK, *et al.*, *Appellants*

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and

JOSE DIAZ, *et al.*,

Appellees

and

JOHN P. CHESIK, on his own behalf and on behalf of his daughter, EMILY, *et al.*,

Appellees

MOTION TO AFFIRM

Intervening appellees, John P. Chesik, et al. by their attorneys, Duane, Morris & Heckscher, move under Rule 16 to affirm the judgment of the three judge court below, on the grounds that plaintiffs below have failed to offer any evidence that the effect of the Acts is other than their stated purpose. The Acts, being clearly constitutional on their face, present no substantial federal question warranting plenary review by this Court.

QUESTIONS PRESENTED

1. Do Acts 194 and 195, amending the Pennsylvania Public School Code to permit pre-existing administrative units of the Department of Education to extend to non-public school children certain secular, neutral and non-ideological benefits presently available to public school children, violate the Establishment Clause of the First Amendment to the United States Constitution?

2. Have plaintiffs met their burden of proving that the Acts, as applied, differ from their stated secular legislative purpose, i.e. to aid all children of the Commonwealth "to develop to the fullest their intellectual capacities"?

STATEMENT OF THE CASE

I. The Statutes Involved.

Acts 194 and 195,[1] which became law on July 12, 1972, amended the Pennsylvania Public School Code of 1949[2]

1. The Legislative Findings & Declaration of Policy for Act 194 state:

> " a) Legislative Finding; Declaration of Policy. The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth, auxiliary services free of charge to children attending public schools within the Commonwealth. Approximately one quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this Act, attend nonpublic schools. Although their parents are taxpayers of the Commonwealth, these children do not receive auxiliary services from the Commonwealth. *It is the intent of the General Assembly by this enactment to assure the providing of such auxiliary services in such a manner that every school child in the Commonwealth will equitably share in the benefits thereof.*" (Emphasis added) (Appendix to Jurisdictional Statement pp. 108a-109a.) (Henceforth such references will be designated merely p. 1a, etc.)

Those for Act 195 state:

> " a) Legislative Findings; Declaration of Policy. The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth, textbooks and instructional materials free of charge to children attending public schools within the Commonwealth. Approximately one quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this act, attend nonpublic schools. Although their parents are taxpayers of the Commonwealth, these children do not receive textbooks or instructional materials from the Commonwealth. *It is the intent of the General Assembly by this enactment to assure* such a distribution of such educational aids *that every school child in the Commonwealth will equitably share in the benefits thereof.*" (emphasis added) (pp. 112a-113a).

2. 24 P.S. §1-101 to 27-2702.

to authorize the Department of Education to extend certain of the same non-ideological educational benefits to children attending nonpublic schools as are currently given to children in the public schools.[3]

The specific benefits under these Acts are: (1) auxiliary services—i.e., special tutoring in basic learning skills[4]; (2) loan of textbooks "which are acceptable for use in any public, elementary, or secondary school;" and loan of (3) non-sectarian instructional materials and (4) non-sectarian instructional equipment for student use.

The programs established by Acts 194 and 195 are similar to the Federal Elementary and Secondary Education Act, Title II[5], which provides for loan of library books and other printed and published instructional materials, including audio-visual materials and textbooks, to both public and nonpublic school students.

3. Under various provisions of the Code, the Commonwealth furnishes auxiliary services to pupils attending public schools. See 24 P.S. §§9-951-9-971. The Commonwealth also furnishes textbooks, instructional materials, and instructional equipment to pupils attending public schools. See *e.g.* 24 P.S. §§8-801, 8-807.1.

4. Act 194 defines auxiliary services as follows:

'Auxiliary services' means (1) *guidance*, (2) *counseling and testing services;* (3) *psychological services;* (4) *services for exceptional children;* (5) *remedial and therapeutic services;* (6) *speech and hearing services;* (7) *services for the improvement of the educationally disadvantaged* (such as, but not limited to, teaching English as a second language), and such other *secular, neutral, non-ideological services* as are of benefit to nonpublic school children and *are presently or hereafter provided for public school children* of the Commonwealth." (Numbers and emphasis added for clarity)

5. Federal Elementary and Secondary Education Act of 1965 (as amended), 20 U.S.C. §§821 *et seq.*

II. The Pleadings, the Record, and the Decision Below.

A. *The Pleadings*

Plaintiffs' complaint attacks Act 194 and 195[6] as unconstitutional on their face and as applied in violation of the Establishment and Free Exercise[7] Clauses of the First Amendment.

Plaintiffs filed motions for a temporary restraining order and a preliminary injunction. The application for a temporary restraining order was denied by a duly constituted three judge court.

B. *Trial on the Merits*

On September 10, 1973, the lower court heard testimony and received evidence on the merits concerning the operation, purpose and effect of the Acts.

Plaintiffs' only witness on the establishment issue was an employee of the Department of Education, who stated that the Commonwealth, in administering the Acts, does not inquire as to any religious characteristics of schools attended by students eligible for benefits under the Acts. This is because by definition,[8] the Legislature's only requirements are that the schools meet the standards for fulfilling the state compulsory education requirements and comply with the provisions of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

Plaintiffs then rested, asserting that the Acts were unconstitutional on their face and that no evidence of the

6. Although appellants, at p. 10 of their brief refer to Act 204, all parties below agreed that plaintiffs' claims concerning Act 204 were decided by *Sloan v. Lemon*, and plaintiffs below thus never pressed that claim.

7. Plaintiffs have apparently abandoned their Free Exercise claim, and must be deemed to have abandoned their attack on the application of the Acts for lack of evidence.

8. Nonpublic school is defined in Acts 104 and 105 in their respective Sections 1(b), pp. 109a and 114a.

application of the Acts was necessary. Plaintiffs were afforded the opportunity to supplement the testimony offered on September 10, 1973, but elected to rest on that record.

All of the defendants' witnesses established that the benefits provided by Acts 194 and 195 had not generally been available to nonpublic school children prior to the passage of the Acts,[9] and that the programs, as administered by the Intermediate Units of the Department of Education and the auxiliary services, supplemented by auxiliary equipment, were of invaluable aid and assistance to children in need of such services as remedial reading, speech therapy, and other similar forms of non-ideological, non-religious instruction.

C. *The Decision Below*

The lower court unanimously affirmed the constitutionality of the textbook provision of Act 195, and also, with one Judge dissenting, the constitutionality of the auxiliary services provided by Act 194, and the instructional materials provisions of Act 195.

It also affirmed, with one Judge dissenting, the constitutionality of the provision under Act 195 of instructional equipment "which from its nature is incapable of diversion to a religious purpose" (p. 46a), and at the same time, unanimously held unconstitutional those sections providing in-

9. See for example testimony of John Jarvis, Headmaster at Lancaster County Day School to the effect that

(1) remedial reading services not previously available are now being offered to the students;
(2) the school students could now benefit from the film catalogue of the Intermediate Unit, which previously was unavailable to Lancaster County Day School students; and
(3) teacher training programs and seminars previously available only to public school teachers are now available through the Intermediate Unit to nonpublic as well as public school teachers.

structional equipment "capable of diversion to sectarian purposes." (p. 46a)[10]

III. The Decision Below Should be Affirmed.

Plaintiffs have failed totally, after a full evidentiary hearing on the merits, to establish any facts in support of their charges that the purpose or effect of the instant litigation is to advance religion. The decision below should be affirmed because the evidence establishes that:

¶ The primary purpose and effect of the Acts is to aid and advance the educational skills of children.

¶ They are not the kind of "class legislation" condemned by the majority in *Sloan v. Lemon*, 413 U.S. 825, 832 (1973) (parent reimbursement) and related cases. The full record establishes that the purpose and effect of Acts 194 and 195 is to extend, on an equal basis to children attending *nonpublic* schools, the same secular educational benefits currently given to children attending *public* schools.

¶ The programs being attacked deal with secular, non-ideological, self-policing, educational services and related equipment. They are administered by the state through the same Intermediate Units of the Department of Education that administer the same kind of benefits for public school children. Hence, there is no need for the kind of administrative policing and entanglement that caused the majority of the court in *Lemon v. Kurtzman* (i.e., direct payments to individual schools and religious orders for the purchase of non-sectarian educational services).

10. No appeal was taken from this aspect of the lower court's order and subsequent references in this brief to instructional equipment refer only to such equipment as is incapable of diversion to sectarian uses.

¶ The textbooks, educational services and related equipment are for the direct and sole benefit of the children—and no funds are given to any religious order or institution. Hence, these Acts do not have the potential for religious divisiveness in the legislative halls that some of the Justices were concerned about in *Lemon v. Kurtzman*, *supra*.

This Court's action affirming *Public Funds for Public Schools of New Jersey v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *affd.* — U.S. —, No. 73-120, 73-121, June 17, 1974, has no application here because of fundamental differences between the New Jersey and Pennsylvania legislation. Among other things, the New Jersey Act was class legislation that conferred a special benefit not available to parents of public school children or parents of nonpublic school children (i.e., reimbursement to parents for textbooks purchased for and owned by nonpublic school students, contrasted with merely *loaning* books to public school children). Likewise the New Jersey legislation had entanglement problems not present here. (See Section II B below).

The Decision Below

The majority opinion of the court below in this case correctly applied the precepts set forth in the opinions of this Court concerning the Establishment Clause of the First Amendment.[11]

11. The lower court applied the criteria set forth by Mr. Chief Justice Burger in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

> "First, the statute must have a secular legislative purpose;
>
> Second, its principal or primary effect must be one that neither advances nor inhibits religion; *Board of Education v. Allen*, 392 U.S. 236, 243 (1968);
>
> Finally, the statute must not foster 'an excessive government entanglement with religion.' " 403 U.S. at 612-613. (paragraphs supplied for clarity)

A. *Primary Purpose*

It is clear, as the court below found, and indeed plaintiffs concede, that the legislative recitals set forth in footnote 1 above indicate a proper secular purpose.

B. *Primary Effect*

After analyzing the various opinions in this Court concerning primary effect (p. 17(a), *et seq.*),[12] the court below held that the provisions of the Acts here on appeal did not have the primary effect of advancing religion.

Appellants in seeking a reversal argue unconstitutionally in that:

> the benefits provide a subsidy to religious schools;
>
> the state must provide continued surveillance to ensure secularity.

Neither the facts or decisions of this Court support plaintiffs' position.

1. *Plaintiffs Failed to Meet their Burden of Proof.*

Appellants have the burden to establish evidence of unconstitutionality. This they failed to do. They offered no evidence to show that the Acts in operation differed from their stated legislative purpose. They offered no evidence that the purpose or effect was to advance religion.

12. *Committee for Public Education and Religious Liberty, PEARL v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education & Religious Liberty, PEARL* 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Hunt v. McNair*, 413 U.S. 472 (1973).

2. *An Incidental Benefit to a Religious Institution Does Not Advance Religion.*

Appellants in arguing "subsidy", ignore a long unbroken line of cases holding that state or federal aid which has only an indirect or incidental effect that may benefit religious institutions is not *per se* unconstitutional.[13]

3. *The Pennsylvania Acts Meet the Four-Fold Criteria Established by Mr. Justice Powell in the Court's Opinion in PEARL v. Nyquist and Sloan v. Lemon.*

This Court, in its opinion in *PEARL v. Nyquist* and *Sloan v. Lemon*, analyzed in depth the limits of permissible state aid for education which does not have the primary effect of advancement of religion. It laid down a four-fold test which, among other things, totally rejects the subsidy argument advanced by appellants.[14]

To pass constitutional muster under the foregoing cases, the projected state aid

13. *PEARL v. Nyquist*, 413 U.S. 756, 775 (1973); *Sloan v. Lemon*, 413 U.S. 825, 832 (1973); *Hunt v. McNair*, 413 U.S. 734, 742-743 (1973); *Norwood v. Harrison*, 413 U.S. 455, 468 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970); *Board of Education v. Allen*, 392 U.S. 236, 244 (1968); *Everson v. Board of Education*, 330 U.S. 1, 17 (1946) and see *McGowan v. Maryland*, 366 U.S. 420, 442-443 (1961); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Bradford v. Roberts*, 175 U.S. 291 (1899).

14. As stated by Mr. Justice Powell in *PEARL v. Nyquist*, *supra*, 413 U.S. at 775.

> "These cases simply recognize that sectarian schools perform secular, educative functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one, as the above cases illustrate. Of course it is true in each case that the provision of such neutral, non-ideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other non-secular areas. *But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.*" (emphasis supplied).

And in *Sloan v. Lemon*, 413 U.S. at 832

> "We think it plain that this [i.e. tuition reimbursement to parents] is quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools." (emphasis in original)

(a) must not be class legislation; and must be
(b) indirect,
(c) incidental, and
(d) neutral, non-ideological.

As summarized below, Acts 194 and 195 clearly meet all these tests.

(a) *This is not class legislation.*

The Acts merely extend to children attending non-public schools, some of the benefits which are already available to children attending public school.

Moreover, the Acts define the benefits in terms of those available to public school students. Thus, by definition no special benefit is made available to one class, non-public students, which is not generally available to public school students.

Finally, whatever factual records concerning the characteristics of nonpublic schools which were developed in other cases are irrelevant here.[15]

(b) *The benefits, if any, to religiously affiliated institutions are indirect.*

Acts 194 and 195 provide no direct payments to any schools in Pennsylvania. There is, therefore, no possibility of any direct financing of religion or religions education.

Just as the text books in *Allen* and the busing in *Everson*, the benefits provided by the Acts are at most indirect benefits that do not advance religion. (See opinion of Burger, C. J. in *Walz v. Tax Commission*, 397 U.S. 664, at 671-672) and opinions cited in footnote 13, *supra*.

(c) *The benefits are incidental*

The requirement that aid be incidental suggests that benefits to pass constitutional muster must not be the core or content of the teaching program, where the risk of religious content is so great. The incidental benefits under these Acts provide the basic tools of the learning process, tools which are themselves neutral.

Mr. Chief Justice Burger for the Court noted this essential difference in *Lemon v. Kurtzman*, 403 U.S. at 617 where he stated:

15. Plaintiffs at page 5 of their brief state that the defendants concede that there are schools included as eligible under the Acts having the 10 religious characteristics there referred. This is just not so. We made no such concession (see notes of testimony, pp. 12-18)—and plaintiffs offered no such proof. Since the benefits are all secular, and are for the benefit of the children—not the schools —, the religious attributes of eligible schools are totally irrelevant. Further, such inquiry is beyond the scope of permissible inquiry under the free exercise clause of the very same constitutional provision under which plaintiffs claim to seek protection.

> "In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not."

It is clear that the textbooks,[16] instructional materials and equipment and auxiliary services, are all tools, and are incidental in the sense that they are not the content of the educational program. They are not "an integral part of the teaching process" but rather are the tools from which the content can be acquired.

(d) *The benefits afforded by Acts 194 and 195 are neutral and non-ideological.*

As discussed in the section below, the services provided are neutral and by their very nature, self-policing and do not require surveillance.

C. *The Acts Do Not Foster Undue Entanglement.*

1. *Acts 194 and 195 are self-policing and surveillance is not required.*

Appellants complain, but without supporting evidence, that comprehensive and continuing surveillance is necessary to insure neutrality. This is just not so.

16. Textbooks of course do relate to the core of educational content, but they are still only the tools of the educator. But they are "incidental" in both *cost* and *educational importance* compared to the role of the classroom teacher.

Furthermore, textbooks are self policing in insuring secular content since the only textbooks that qualify under the Act are those which are "acceptable for use in any public . . . school".

Finally, textbooks have been held clearly valid under *Allen*, and see *Norwood v. Harrison*, *supra*.

By definition, all the benefits provided under the Acts are neutral, secular and non-ideological.[17] Plaintiffs below offered no evidence to the contrary.

Moreover, the Acts define the benefits in terms of those available to public school students.[18] Therefore, by definition these benefits are self-policing.

The Acts are administered by the same people who provide the same services, materials and equipment, to the public schools. These benefits are admittedly secular and do not require the surveillance suggested by appellants. Furthermore, there is no evidence that the administrative contact between the state and nonpublic schools is any greater than prior to the passage of the Acts when there already were requirements relating to the state's compulsory education requirements, health and safety regulations etc.[19]

Finally, mere administrative entanglement is not sufficient to invalidate otherwise permissible legislation. *Hunt v. McNair, supra, cf. Wheeler v. Barrera, supra.*

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17. The definition of auxiliary services in Act 194 (see footnote 4 above) limits the benefits to "secular, neutral, non-ideological services." Act 195 defines instructional equipment as "educational, secular, neutral, non-ideological equipment," which is not susceptible to diversion to sectarian uses. Instructional materials include only "secular, neutral, non-ideological materials."

18. Auxiliary services are by definition only services which "are presently or hereafter provided for public school children of the Commonwealth." Instructional equipment and machinery are likewise limited by definition to items which "are presently or hereafter provided for public school children of the Commonwealth." Textbooks are limited to "textbooks which are acceptable for use in any public, elementary or secondary school of the Commonwealth."

19. *E.g.*, 24 P.S. §13-1327, 24 P.S. §§14-401 to 14-122; Law of March 10, 1949, P.L. 30, Art. XII, Section 1303 (repealed 1972) (Smallpox vaccination).

2. *There is no legislative divisiveness*

Appellants argue that the provisions of the Act relating to instructional materials and equipment foster political entanglement, and religious divisiveness. (Appellants' Jurisdictional Statement, pp. 13-14). They offered no evidence to support such a charge.

Since the Acts are for the benefit of all the children of the Commonwealth—attending both public and nonpublic schools, the potential for political divisiveness on religious grounds referred to in *Lemon v. Kurtzman, supra*, and *PEARL v. Nyquist, supra*, is not present in this case.

Furthermore, unlike the statute condemned in *Lemon v. Kurtzman* (which provided for direct payments to schools), no funds here are paid directly to any schools or religious orders. Thus the schools or religious orders have no direct stake in lobbying for funds.

IV. These Acts Are Distinguishable From Those Held Invalid by the Supreme Court.

A. *Previous cases*

The legislative declarations of purposes of Acts 194 and 195 are completely different from the previous acts held invalid by this Court. In those cases, the legislative declarations indicated the purpose of preserving pluralism and were a response to a crisis in nonpublic schools created by rapidly rising costs. See *Sloan v. Lemon*, 413 U.S. at 829.

Acts 194 and 195 on the other hand, as did the legislation in *Allen, supra*, and *Everson, supra*, have as their sole legislative purpose the extension of certain limited benefits to *all* school children in Pennsylvania.

Furthermore, the programs established by Acts 194

and 195 are significantly different from all the previous legislative enactments invalidated by this Court.[20]

B. *Public Funds for Public Schools of New Jersey v. Marburger*

On June 17, 1974 this Court affirmed the three judge court decision in *Public Funds for Public Schools of New Jersey v. Marburger*, 358 F.Supp. 29 (D.N.J. 1973) aff'd. — U.S. —, (Nos. 73-120, 73-121, June 17, 1974). Burger, C.J., White and Rehnquist voting to note probable jurisdiction.

Marburger is clearly distinguishable from the Pennsylvania Acts here under consideration.

1. *Class Legislation:*

In *Marburger*, the Court found that the New Jersey Legislative scheme was clearly class legislation designed to benefit religious schools—and conferred a special benefit on parents of nonpublic school children not extended to parents of public school children.

20.

1) *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (purchase of secular educational instruction in traditional subjects) involved *direct* grants to schools and required extensive surveillance to insure non-sectarian teaching.

2) *PEARL v. Nyquist*, 413 U.S. 756 (1973) likewise involved direct money for grants for maintenance and repair of buildings, with no way to separate between religious and non-religious use.

3) *Sloan v. Lemon*, 413 U.S. 825 (1973) struck down a tuition reimbursement program because it was deemed to be class legislation which conferred a special benefit on parents of children attending religious schools.

4) *Levitt v. PEARL*, 413 U.S. 472, provided direct grants to nonpublic schools for testing and teacher prepared tests, but the grants were unrelated to actual cost.

Thus, in New Jersey textbooks were *loaned* to public school children. Because of a *parent reimbursement* provision for textbooks for nonpublic school children,[21] these children owned their books outright.

Under §5 of the New Jersey Act, parents of nonpublic school children could be reimbursed for secular, non-ideological materials and supplies—as well as textbooks. There was no equivalent benefit for parents of public school children.

The lower court in *Marburger* held that because of the absence of state supervision to insure that the materials and supplies were not put to sectarian use, the New Jersey Act provided a benefit to religion, and noted that such supervision would create undue entanglement. Furthermore, to obtain reimbursement, proof had to be given by nonpublic schools to the State showing that the expenditures complied with the Act, thus posing entanglement problems.

The New Jersey statutory scheme contrasts sharply with the Pennsylvania Acts where benefits are furnished through the Department of Education Intermediate Units in the same fashion both to public and nonpublic school children.

In *Marburger*, the Court made a specific finding, that the principal beneficiaries of the Act were religious schools whose financial stability the Act was designed to promote. There is no such finding or evidence in this case.[22]

Finally, in *Marburger*, there was no finding, as in the instant case, that the benefits given to children of non-

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21. ". . . unlike the legislative programs in *Allen* and *Everson*, the assistance provided by Section 5 is not extended to parents of all students but only to a special class; . . ." 358 F.Supp. at 36.

22. The legislative declaration in *Marburger* in its commitment to preserve pluralism in education is similar to the legislative declaration struck down in *Lemon v. Kurtzman* and *PEARL v. Nyquist* and is unlike the limited goals set forth in Acts 194 and 195.

public schools were merely an extension of the same benefits currently given to children in public schools.

2. *Entanglement*

The *Marburger* court invalidated §6 of the New Jersey Act because of the potential for administrative entanglement. The New Jersey Administrative Code §6-2(f) (quoted in full in *Marburger*, 358 F.Supp. at 39 required:

> " . . . Such [auxiliary] services are to be provided on the basis of mutually satisfactory arrangements between the nonpublic school and the local board of education. Both the nonpublic school and the local board of education shall make good faith efforts to reach these mutually satisfactory arrangements."

The New Jersey court, 358 F.Supp. at 40, construed this provision to require the local school board "to inquire into the religious procedures and curricula of the non-public school", and, therefore, held that section invalid on the grounds of entanglement.

There is nothing in Acts 194 and 195 which can be construed as permitting inquiry by the Intermediate Units into the religious procedures and curricula of nonpublic schools.

The services in the Pennsylvania Acts are defined by the Legislature. It has not given the local units discretion to negotiate with nonpublic schools concerning the educational desirability of any particular service. These Acts, therefore, do not pose the potential for administrative entanglement present in *Marburger*.

CONCLUSION

The recent decisions by this Court including this Court's opinion in *Wheeler v. Barrera*[23] indicate clearly that it has not retreated from the holdings of *Allen* and *Everson*.

The benefits provided under Acts 194 and 195 correspond to the provisions providing for textbooks to all school children upheld in *Allen* or the reimbursement for providing bus transportation to all school pupils upheld in *Everson*.

The provisions of Acts 194 and 195, meet the requirements set forth by Mr. Justice Powell in *PEARL v. Nyquist* and *Sloan v. Lemon*:

1) The benefits are not provided to a specific class but rather are afforded to all Pennsylvania school children.

2) The aid is indirect, no direct payments are made to any schools and no lump sum payment is made which would enable a school to use any excess for some other purpose.

3) The benefits are incidental in that they are not the core or content of the teaching process where the pressure for religious content are greatest.

---

23. In *Wheeler v. Barrera* (No. 73-62, June 10, 1974), this Court considered questions presented by Title I of the Elementary and Secondary Education Act of 1965, as amended, 21 U.S.C. §— *et seq.*, which authorizes educational assistance for both private and public school children.

The Court did not directly rule on the constitutionality of a state program under Title I in which public school teachers entered private schools, facilities, holding that it was not necessary under the circumstances to decide that question.

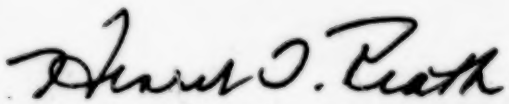
Nevertheless, the opinions seem to indicate that it is possible to provide comparable Title I programs for public and private school children.

4) The benefits are neutral and non-ideological.

5) The problems of entanglement which struck down purchase of service contracts in *Lemon v. Kurtzman* are not here present.

In summary then, we request this Court to affirm the carefully reasoned opinion of the Court below on the grounds that appellants have failed to offer any evidence that the effect of the Acts is other than its stated purpose and that the Acts on their face are constitutional. Thus they present no substantial federal question warranting plenary review by this Court.

Respectfully submitted,



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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1765.

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL and AMERICANS FOR SEPARATION OF CHURCH AND STATE,

Appellants,

v.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,

Appellees,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, et al.,

Intervening Parties Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 73-269.

SYLVIA MEEK, ET AL.,
Appellants,

v.

JOHN C. PITTENGER, ET AL.,
Appellees,

and

JOSE DIAZ, ET AL.,
Intervening Parties Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLANTS.

OPINIONS BELOW.

The majority and dissenting opinions of the District Court are reported at 374 F. Supp. 639. Copies of the opinions are set forth as appendices to the Jurisdictional Statement herein, and page reference to them in this brief will be preceded by the letters JS.

JURISDICTION.

The decision of the District Court and its Final Order were entered on March 7, 1974. A notice of appeal was filed on March 20, 1974. Probable jurisdiction was noted on October 15, 1974.

The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1253. *Lemon v. Kurtzman*, 403 U. S. 602 (1971); *Committee for Public Education and Religion Liberty v. Nyquist*, 413 U. S. 756 (1973).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The First Amendment to the United States Constitutional provides in part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *.

Acts 194 and 195 are set forth as appendices to the Jurisdictional Statement and page references thereto will be preceded by the letters JS.[1]

1. Also challenged in the present suit was Act 204, which amended the State's "tuition reimbursement law" by increasing from 5 to 10% of the Cigarette Tax revenue the amount to be appropriated for payment of the tuition reimbursements. Act 204 was signed into law after the District Court declared the statute unconstitutional. This Court's affirmance of the District Court's decision, *Sloan v. Lemon*, 413 U. S. 825 (1973), rendered that part of the complaint herein moot.

QUESTIONS PRESENTED.

1. Does Act 194, which authorizes the expenditure of Commonwealth funds to provide auxiliary services in religious elementary and secondary schools, violate the Establishment Clause of the First Amendment to the United States Constitution?

2. Does Act 195 violate the Establishment Clause of the First Amendment insofar as it authorizes the use of Commonwealth funds to purchase, for use in religious elementary and secondary schools, (a) textbooks, (b) instructional materials, and (c) instruction equipment which "from its nature cannot be readily diverted to religious purposes"?

STATEMENT OF THE CASE.

The statutes challenged in this suit are the most recent in a series of laws enacted by the Pennsylvania Legislature in a continuing effort to provide tax-raised funds for the support of religious and private schools. Paragraph 8 of the complaint herein alleges and the appellees concede that included as eligible under the Acts are schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty apponitments, and (10) impose religious restrictions on what the faculty may teach.

Act 194 deals with auxiliary services which are defined (in section 1(b)) as:

> . . . guidance, counseling and testing services; psychological services, services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

Textbooks are provided for in Act 195 and are defined, in section 1(b):

> "Textbooks" means books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group. Such textbooks shall be textbooks which are acceptable for use in any public, elementary, or secondary school of the Commonwealth.

Instructional materials and instructional equipment are also provided for in Act 195. The former are defined as follows:

> "Instructional materials" means books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparencies, films, filmstrips, kinescopes and video tapes, or any other printed and published materials of a similar nature made by any method now developed or hereafter to be developed. The term includes such other secular, neutral, non-ideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

Instructional equipment is defined as follows:

> "Instructional equipment" means instructional equipment, other than fixtures annexed to and forming part of the real estate, which is suitable for and to be used by children and/or tecahers. The term includes but is not limited to projection equipment, recording equipment, laboratory equipment, and any other educational secular, neutral, non-ideological equipment as

may be of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

A three-judge court was duly convened and the plaintiffs moved for a preliminary injunction. At the hearing on the motion, held on September 10, 1973, the court directed that the trial of the action on the merits be advanced and consolidated with the hearing on the motion.

On March 7, 1974, the court handed down its decision as follows:

1. A majority of the court (Circuit Judge Gibson and District Judge Bechtle) upheld the constitutionality of Act 194. District Judge Higginbotham dissented.

2. With Judge Higginbotham's extremely reluctant concurrence, the court unanimously upheld the textbook provision of Act 195.

3. With Judge Higginbotham dissenting, the court upheld the instructional materials provision of Act 195.

4. With Judge Higginbotham dissenting, the court upheld the constitutionality of so much of Act 195 as authorized the expenditure of Commonwealth funds for religious school use of instructional equipment which "from its nature cannot be readily diverted to religious purposes, and is particularly designed or designated for . . . secular educational purposes provided for in . . . [the] statute and its duly-promulgated guides for the administration of such statute."

5. The court unanimously held unconstitutional so much of Act 195 as authorized expenditure of Commonwealth funds for religious school use of other instructional equipment. The court's order enjoined the defendants

from expending Commonwealth funds for the loaning of such instructional equipment and directed them to file amended guidelines describing the types of permissible equipment they intended to provide for nonpublic schools. (A copy of the guidelines is set forth herein as Appendix A, *infra*, pp. 33-34.)

SUMMARY OF ARGUMENT.

Acts 194, 195 and 204 manifest a legislative approach that views the Establishment Clause as a necessary evil—necessary because there is no practical way of removing it from the Constitution, but an evil nevertheless and therefore to be evaded or avoided to whatever extent possible. This was not the attitude of the generation that wrote the Clause into the Constitution; to them it reflected salutary democratic polity, and they expected that future generations would honor it in spirit as well as letter. Certainly it does not conform with the approach of this Court to the Clause, an approach concretized by the fact that after *Board of Education v. Allen,* 392 U. S. 236 (1963), the Court has repulsed every effort to evade or weaken the Clause through appropriation of public funds to finance the operation of church schools on the elementary and secondary level.

Act 194, providing for auxiliary educational services, cannot be reconciled with the decisions of this Court, particularly, *Lemon v. Kurtzman* and *Earley v. DiCenso,* 403 U. S. 602 (1971). The purpose and effect of the statute, just as of the earlier Pennsylvania law and the Rhode Island law, is to finance the teaching of secular subjects in church schools. *Lemon* and *DiCenso* held that this cannot be done under the Establishment Clause, either because it advances religion or because it entails forbidden state entanglement in religious operations, or both.

Act 195, providing for textbooks, was upheld by the District Court on the authority of *Allen. Allen,* however, was inconsistent with the interpretation of the Establishment Clause in the Court's pre-*Allen* decisions, and certainly is inconsistent with the language and spirit of the Court's many post-*Allen* decisions. The time may well

have come for the Court to re-examine *Allen* in the light of these decisions. But even if the Court should not do so, justification of Act 195 would require not merely following *Allen* but extending it, and this the Court has refused to do and cannot consistently with its many other decisions do.

The instructional materials provisions of Act 195 clearly go beyond the verge of *Allen* and the New York statute it upheld. The principles of advancement of religion, administrative entanglement and religious divisiveness are all applicable to these provisions of the Act.

Even the District Court recognized that the instructional equipment provisions went beyond the verge of *Allen,* no matter how liberally that decision is interpreted. It sought to cure the defect by limiting the statute to equipment which "from its nature cannot readily be diverted to religious purposes, and is particularly designed or designated for such secular purposes as provided for in said statute and its duly promulgated guidelines for the administration of such statute." This effort, we submit, is ineffectual; the statute is fatally defective on its face and is not subject to salvation by judicial interpretation or limitation.

ARGUMENT.

I.

The Establishment Clause: Friend or Foe?

We have noted that Acts 194, 195 and 204 followed invalidation of earlier efforts to divert tax-raised funds for the support of parochial and private schools. This pattern of searching for an acceptable variation of the same theme has been followed in a number of other states, notably New York and Ohio. The common motivating attitude is the same: the Establishment Clause is a necessary evil. It is necessary because it is quite obvious that the American people are not prepared to excise it from the Constitution. More than a decade has passed since the Court outlawed state-sponsored prayer and Bible reading in the public schools in *Engel v. Vitale,* 307 U. S. 421 (1962); *Abington School District v. Schempp,* 374 U. S. 203 (1963). During this period, there have been several determined efforts to overrule these decisions by constitutional amendment; all have failed. The chances of amending the Constitution to overrule the aid to parochial school decisions are even smaller; so small as to be negligible, as evidenced by the fact that unlike the prayer and Bible situation there does not appear to have been, at least until the present time, any serious effort to amend the Constitution to overrule these decisions.

Nevertheless, in these states the legislatures deem the Establishment Clause a foe, to be evaded and outwitted by whatever strategem may prove effective. If purchase of services won't work (*Lemon v. Kurtzman, supra*) try tuition reimbursement. If that won't work (*Sloan v. Lemon, supra*) try auxiliary services. If that won't work, go back to the drawing boards and come up with something else.

The generation that wrote the Establishment Clause into the Constitution did not view it as an enemy of the people. On the contrary, they deemed it the surest and most effective protector of religious freedom, and expected that its spirit as well as its letter would be honored by future generations. Above all, they intended to bar just the type of legislation involved in the present litigation. As concluded by the noted historian, Professor Leonard Levy, in his study, "No Establishment of Religion: The Original Understanding":

> * * * An establishment of religion in America at the time of the framing of the Bill of Rights meant government aid and sponsorship of religion, principally by impartial tax support of the institutions of religion, the churches.[2]

With the exception of *Allen,* to which we will address ourselves later, the decisions of this Court, at least as far as elementary and secondary schools are concerned, manifest a consistent adherence to the intent of the framers of the Clause. Every legislative effort to channel tax-raised funds to church schools, directly or indirectly, was repulsed and held violative of the Establishment Clause.

In *Lemon v. Kurtzman, supra,* the Court invalidated a purchase-of-services statute financed out of the proceeds of horseracing.

In *Sanders v. Johnson,* 403 U. S. 955 (1971), it affirmed without opinion a district court decision (319 F. Supp. 421) holding unconstitutional a purchase-of-services statute financed out of the general treasury.

In *Earley v. DiCenso, supra,* it held unconstitutional a salary supplement law.

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2. L. W. Levy, Judgments: Essays on American Constitutional History, p. 202 (1972).

In *Committee for Public Education and Religious Liberty v. Nyquist, supra,* it ruled invalid a statute providing tuition payments for low-income families.

In *Sloan v. Lemon, supra,* it invalidated a tuition reimbursement law.

In *Essex v. Wolman,* 409 U. S. 808 (1973), it affirmed without opinion a district court decision (342 F. Supp. 399) ruling unconstitutional a general tuition grants law.

In *Nyquist,* it struck down a law providing tax benefits for parents whose children attend parochial schools.

In *Grit v. Wolman,* — U. S. —, 93 S. Ct. 3062 (1973), it affirmed without opinion a District Court decision (353 F. Supp. 744) invalidating a law providing tax credits for such parents.

In *Nyquist,* it held unconstitutional statutory maintenance and repair grants to parochial schools.

In *Levitt v. Committee for Public Education and Religious Liberty,* 413 U. S. 472 (1973), it nullified statutory grants to pay for law-mandated services performed in parochial schools.

In *Donahey v. Protestants and Other Americans United for Separation of Church and State,* 403 U. S. 955 (1971), it denied a petition for certiorari to review a Court of Appeals decision, *Protestants and Other Americans United for Separation of Church and State v. United States,* 435 F. 2d 627 (1971), holding that, notwithstanding *Allen,* a substantial Federal question requiring the convening of a three-judge court was presented in an attack upon the textbook title of the Elementary and Secondary Education Act of 1965.

In *Brusca v. State Board of Education,* 405 U. S. 1050 (1972), it affirmed a decision (332 F. Supp. 275) holding that exclusion of parochial schools from tax-funding of education did not violate any constitutional rights of parents sending their children to such schools.

In *Franchise Tax Board v. United Americans,* — U. S. —, No. 73-1718, decided October 21, 1974, it affirmed a District Court decision invalidating a statute providing tax reductions for parents of parochial school pupils.

In *Luetkemeyer v. Kaufmann,* — U. S. —, No. 73-1612, decided October 21, 1974, it affirmed a decision upholding a Missouri law limiting free transportation to pupils attending public schools.

Finally, in *Marburger v. Public Funds for Public Schools,* — U. S. —, 94 S. Ct. 3163 (1974), it affirmed a District Court decision (358 F. Supp. 29) holding unconstitutional on its face a New Jersey statute providing auxiliary services, textbooks, instructional materials and instructional equipment to private and parochial schools. The New Jersey statute invalidated in *Marburger* is substantially identical with Acts 194 and 195; in some respects, there are minor differences but, we suggest, none rises to constitutional dimensions. We recognize that a *per curiam* affirmance does not have the same precedential force as an affirmance with opinion. The reason for that is that it is not certain that the Court affirmed on the ground on which the lower court based its decision. The history of *Marburger,* however, indicates that the Court considered the case and decided it within the same framework as did the District Court, namely, the principles set forth and applied in *Lemon v. Kurtzman* and *Earley v. DiCenso* and their progeny. See *Marburger v. Public Funds for Public Schools,* — U. S. —, 93 S. Ct. 3024 (1973).

Two decisions of this Court, both before 1971, upheld expenditures at the elementary and secondary school level: *Everson v. Board of Education,* 330 U. S. 1 (1947) (bus transportation), and *Allen* (textbooks). Both are relied upon by the District Court, but the key to the resolution of the present case is the following from this Court's opinion in *Sloan v. Lemon,* 93 S. Ct. at 2986-87 (1973):

> . . . Such benefits [as allowed in *Everson* and *Allen*] were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the "verge" of the constitutionally impermissible. . . . In *Lemon* we declined to allow *Everson* to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial political support". . . . *Again today we decline to approach or overstep the "precipice" of establishment against which the Religion Clauses protect.* (Citations omitted. Emphasis added.)

The statutes challenged in this suit, we submit, constitute still another "further step" in seeking to grant assistance to church schools. Again the Court should "decline to approach or overstep the 'precipice' of establishment against which the Religion Clauses protect."

II.

Act 194: Auxiliary Services.

The opinion of the District Court (JS, p. 11a) states that we are dealing in this litigation "with four separate programs." We respectfully disagree. We suggest that Acts 194, 195 and 204 constitute a single package designed to recoup for the religious schools what was lost to them by virtue of *Lemon v. Kurtzman, supra,* and *Sloan v. Lemon, supra.* The New Jersey Legislature combined in a single statute what is contained in Acts 194 and 195. The District Court in *Marburger* considered the statute there as a whole and invalidated it as a whole. So, too, in the present case in determining the purpose and effect of Acts

194 and 195, they should be considered as a single legislative act. For convenience, however, we discuss each of the parts of the two statutes separately. We do this because we are confident that, whether considered separately or together, each of the programs violates the Establishment Clause.

For the reasons fully expounded in Judge Higginbotham's dissenting opinion and the District Court's opinion in *Marburger*, we submit that Act 194 cannot stand. The Pennsylvania Legislature has not avoided nor can it avoid both the Scylla of aid and the Charybdis of entanglement.

Act 194 is open-ended. It defines auxiliary services to include "such other secular, neutral, non-ideological services as are of benefit to nonpublic school children. . . ." The Regulations adopted by the State Board of Education to implement the Act interpret this to include instructional services for bringing pupils below grade to grade level.[3]

Every school, as part of its normal operations, provides instructional services to below grade level students to bring them up to grade level and to assist them to perform at the grade level for their age and potential. Indeed, there are very few schools in which every pupil is at or above grade level in every subject taught, and it is doubtful that any school fails to provide services to the pupils to bring them up to grade level in each subject. Whatever additional expense is involved is a normal part of the school's operating budget. By relieving the nonpublic schools of this part of their operating costs, the Commonwealth of Pennsylvania is subsidizing the normal operations of nonpublic schools, including those which have as

3. Regulation 1.11 reads: "*Services for the improvement of educationally disadvantaged* shall include but are not limited to those services necessary to assist a student to perform at the grade level for his age and potential." (JS, page 30a.)

their purpose the teaching, propagation and promotion of a particular religious faith, are an integral part of the religious mission of the sponsoring church, and have as a substantial or predominating purpose the inculcation of religious values.

Act 194 seeks to limit publicly financed services to such as are "secular, neutral, and non-ideological"; it could hardly do otherwise in view of the restrictions of the First Amendment. But how can the State make sure, as it must, that the subsidized teachers do not inculcate religion? It can only do so by "comprehensive, discriminating, and continuing state surveillance" which the Court held in *Lemon* is forbidden by the Establishment Clause (403 U. S. at 619). We can see no constitutional distinction between teaching "secular, neutral, and nonideological" subjects to grade level students in church schools and teaching them to students below grade level in the same schools. In *Lemon*, the Court held the former to be unconstitutional; we submit, the latter is equally unconstitutional.

Act 194 is fatally defective on two grounds. It subsidizes the teaching of secular subjects in church schools, which *Lemon* held cannot be constitutionally done. At the same time, it propels the State into partnership with the church—a junior partnership but a partnership nonetheless—in the operation of church schools. If there was anything the Establishment Clause was intended to accomplish it was to forbid such partnerships of Church and State, common throughout European history, from taking root on these shores. This is what the Court had in mind when, in *Walz v. Tax Commission*, 397 U. S. 664 (1970), it said (at 674):

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. • • •

In *Lemon*, the Court went out of its way to point out the holding in *Walz* "tended to confine rather than enlarge the area of permissible state involvement wih religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship" (403 U. S. at 614). The Court said further (at 615):

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority. • • •

For that reason, the complaint in this case alleged that the Acts, both on their face and as administered, encompass as permissible beneficiaries schools which impose religious restrictions on admissions, require attendance of pupils at religious exercises, require obedience by students in the doctrines and dogmas of a particular faith, are an integral part of the religious mission of the church sponsoring them, have as a substantial purpose the inculcation of religious values, impose religious restrictions on faculty appointments, and impose religious restricions on what or how the faculty may teach.

These indicia of religiosity were culled from the various opinions in *Lemon*, *DiCenso* and *Tilton v. Richardson*, 403 U. S. 672 (1971), and indicate the "character and purposes" of institutions which the Court would hold ineligible under the *Walz* test. In *Tilton*, the plurality opinion deemed use of such a "profile" to be inappropriate because none of the defendant colleges fitted the profile and colleges

which did were held by the government to be ineligible to receive benefits (403 U. S. at 682).

The exact opposite is the case here. As we have pointed out (*supra*, p. 4), all parties concede that institutions fitting this description are eligible to receive benefits under the Act. It may well be that there may be few schools in Pennsylvania which fit the profile in every detail, but it is quite obvious that far less is necessary to establish unconstitutionality; indeed, we suggest, any one of them would be enough. Thus, Mr. Justice White, in his concurring-dissenting opinion in *Tilton-Lemon-DiCenso* stated that, if any school restricted entry on religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith, the legislation would to that extent be unconstitutional (403 U. S. at 671, footnote 2). Similarly, it is difficult to see how, in the light of *Epperson v. Arkansas*, 393 U. S. 97 (1968), government can finance schools which impose religious restrictions on what or how the faculty may teach.

It is immaterial that the secular educational services provided for in Act 194 are designated "auxiliary"; constitutionally, they are indistinguishable from other teaching services. As the District Court said in *Marburger:*

> The defendants argue that no surveillance would be required to enforce State limitations in the auxiliary program because the processes which would be involved in remedial reading or remedial arithmetic are clearly more peripheral to the possibility of religious indoctrination than the initial teaching of reading and arithmetic. Even though this argument is sound, to a degree, a teacher who teaches reading or remedial reading remains a teacher. A teacher's instruction may vary in content or emphasis and is not entirely predictable. A teacher is not a textbook, the contents of which remain constant, as the Court recognized in *Lemon*, stating:
>
> > We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. *Lemon, supra*, at 617.
>
> This being so, it would be necessary to continually review the content of a teacher's instruction in order to see that it adheres to the restrictions imposed by the statute, in that it be confined only to secular and non-ideological matter.
>
> Moreover, it is clear that the teachers providing such auxiliary services will be functioning within the confines and environment of a given religious institution where a religious atmosphere may be pervasive. Although the teachers of auxiliary services are not employed by a religious organization and are not directly subject to the direction and discipline of a religious authority, they will, nonetheless, be working in atmospheres dedicated to the rearing of children in a particular religious faith. Again it would seem that a constant review of that instruction would be required in order to determine that the religious atmosphere has not caused religion to be reflected—even unintentionally—in the instruction provided by such teachers. Furthermore, the arrangement may provoke some controversy, as noted in *Lemon*, between the auxiliary teachers and the religious authority over the precise meaning and extent of the legislative restraints. See *Lemon v. Kurtzman, supra*, at 619.

In *Walz*, the Court warned against "governmental grant programs [which] could encompass sustained and detailed administrative relationships for enforcement of statutory and administrative standards." For that reason, in *Lemon-DiCenso* it ruled unconstitutional the Pennsylvania and Rhode Island statutes financing secular teachings in church schools. In the present case, completely aside from the question of surveillance, we cannot see how publicly employed personnel can be assigned to render educational services in religious schools without involving both church and state in sustained administrative relationships. A religious school does not cease to be a religious school when a public school teacher walks in. It remains under the control and direction of the religious authorities and the public school teacher must work out his or her operational relations with them on a continuing and day-to-day basis.

It does not matter whether the auxiliary services teacher is initially engaged by the public or by the church school authorities. Nor does it matter whether the teacher is primarily accountable to the public or to the church school authorities. (In most cases, he or she will undoubtedly be working under the supervision of both.) The Establishment Clause, as we have noted, forbids a partnership between church and state no less than one of master and servant.

However viewed, we submit, Act 194 cannot stand under the First Amendment as written by the Constitutional fathers or as interpreted and applied by this Court.

III.

Act 195: Textbooks.

The District Court based its justification of the textbook provisions of Act 195 on *Allen*. Even Judge Higginbotham, though with great reluctance, went along. This, we

believe, was error; Act 195 goes beyond *Allen* and there was no more reason to extend that decision in the present case than in *Marburger*. We will expand on this point shortly; but at the present time we suggest that the time may well have arrived for the Court to re-examine and reconsider *Allen*.

The sole basis of *Allen* was *Everson;* but *Everson* itself, as the Court conceded, went to the very verge of the constitutionally permissible, and *Allen* went beyond that verge. It is of great significance that the author of the *Everson* opinion, Mr. Justice Black, vigorously dissented from the *Allen* opinion. In *Everson,* the Court said (330 U. S. at 15-16):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (Emphasis supplied.)

The New Jersey statute was upheld because the "state contributes no money to the schools" and "does not support them" (330 U. S. at 18).

In *McCollum v. Board of Education,* 333 U. S. 203 (1948), the Court held it unconstitutional to allow the use of public school premises for sectarian teachings. The Court repeated that, *"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion"* (Emphasis supplied; 333 U. S. at 210).

In *Zorach v. Clauson,* 343 U. S. 306 (1952), the Court upheld the constitutionality of a program of released time for religious education under which children would be released from public school for one hour a week to receive religious instruction in church schools, *because no expenditure of public funds or use of public buildings was involved.* The Court said (at 314): *"Government may not finance religious groups* nor undertake religious instructions *nor blend secular and sectarian education* * * *" (Emphasis supplied.)

In *McGowan v. Maryland,* 366 U. S. 420, 443 (1961), and *Torcaso v. Watkins,* 367 U. S. 488, 493 (1961), the Court again, in each case, repeated the statement, made in the *Everson* and *McCollum* cases, that *"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."* (Emphasis supplied.)

In *Engel v. Vitale, supra,* the Court, in holding unconstitutional the practice of prayer recitation in the public schools, which had been prevalent almost since the founding of the public schools, stated that when "the power, prestige *and financial support* of government is placed behind a particular religious belief," the Establishment Clause of the

First Amendment is violated. (Emphasis supplied.) The Court (370 U. S. at 436) quoted from Madison's *Memorial and Remonstrance* that "* * * the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

In *Abington School District v. Schempp, supra,* the Court invalidated devotional Bible reading and prayer recitation in the public schools, and while it set forth a test (purpose and effect) somewhat different in wording from that in *Everson* it cited *Everson* in support of the test and of its decision.

In sum, nothing in the Court's decisions before *Allen* required or even justified the conclusion reached in *Allen.* The post-*Allen* decisions (which we have already reviewed, *supra,* pp. 11-14) are even clearer. Significant as is the dissent in *Allen* by the author of the *Everson* opinion, even more so is the fact that the author of the *Allen* opinion dissented from every decision in the post-*Allen* era. He did so on the ground that these decisions were inconsistent with *Allen,* and we suggest that he was correct in this. We suggest that *Allen* cannot be reconciled with the letter or spirit of all the judicial history that preceded it, and even less so with that which followed it. In short, we think the time has arrived for the Court to reconsider *Allen,* and on reconsideration to overrule it.

Should, however, the Court not be prepared at the present time to do this, we submit that it should nevertheless hold the textbook provisions of Act 195 to be unconstitutional. These go substantially beyond *Allen* and the New York statute which it upheld and can be justified only if the Court goes substantially beyond the verge reached in *Allen.*

As we have noted, Act 195 (Section 922-A(c)) provides that t[illegible]ooks shall be furnished "subject to such rules and regul[illegible]ons as may be prescribed by the Secretary of Education." Rules and regulations (Guidelines for the Administration of Acts 194 and 195) having been prescribed, they are deemed part of the statute and must be scrutinized by the Court in determining the facial constitutionality of the statute. Such scrutiny, we submit, will show that there is present such administrative entanglement (in addition, of course, to political entanglement and religious divisiveness) as requires invalidation under the principles announced in *Lemon-DiCenso* and subsequent cases. Specifically, we point out the following:

> 1. Although the Act provides that the textbooks shall be loaned "upon individual request" of children, the Guidelines make no provision for individual requests to the Department of Education but rather require that the nonpublic schools make the requests. Guidelines 4.3.

2. The nonpublic school is granted a five percent transportation allowance. *Ibid.* 4.4.

3. The textbooks are not delivered to the children but to the schools. *Ibid.* 4.7.

4. The Department of Education is responsible for fiscal control, fund accounting and maintaining records for the acquisition of the textbooks. *Ibid.* 4.7. Obviously, this requires the surveillance and fiscal control of the operations of parochial schools which this Court held constitutionally impermissible in *Walz, Lemon, DiCenso* and *Nyquist-Sloan-Levitt.*

5. Each nonpublic school is responsible for any expenditures in excess of its allocation. *Ibid.* 4.9.

This, too, obviously requires surveillance, auditing and fiscal control.

6. The nonpublic schools are required to maintain an inventory of the textbooks. *Ibid.* 4.10a.

7. "It is presumed that textbooks *on loan to nonpublic schools* [sic] after a period of time will be lost, missing, obsolete or worn out. This information should be communicated [presumably by the school rather than the individual children] to the Department of Education." *Ibid.* 4.11.

8. The nonpublic school is responsible for maintaining on file certificates of requests for all textbooks loaned under the Act. The file must be open to inspection by the appropriate public authority. *Ibid.* 4.13. Here, again, we have an instance of that "comprehensive, discriminating, continuing state surveillance" required to insure that the First Amendment's restrictions will be obeyed. *Lemon-DiCenso,* 403 U. S. at 619.

In sum, even as to textbooks, Act 195 involves a primary purpose to advance religion, administrative entanglement between church and state, and state surveillance of the operations of religious schools, all in violation of the Establishment Clause as interpreted by this Court.

IV.

Act 195: Instructional Materials.

We have set forth (*supra,* pp. 5-6) the statutory definition of instructional materials. This too is open ended: "The term includes such other secular, neutral, nonideological materials as are of benefit to the nonpublic

school children and are presently or hereafter provided public school children of the Commonwealth." These clearly go beyond the verge of *Allen* and the New York statute it upheld. Clearly, the principles of advancement of religion, administrative entanglement, and political and religious divisiveness (the latter stated in *Lemon* and amplified in Part III of *Nyquist* and footnote 7 in *Sloan*), are all applicable to the provisions of Act 195. Moreover, and most important, the Pennsylvania Legislature itself made a distinction between textbooks and everything else. Section 922-A(c) in providing for "loan of textbooks" requires that loans be made to children "upon individual request." Subdivision (c), on the other hand, provides that the loans of other materials, supplies and equipment be made to the nonpublic schools on *their* request. In *Allen*, the Court stressed that under the statute "no funds or books are furnished the parochial schools" (392 U. S. at 243-44), and found it "in conformity with the Constitution, for the books are furnished for the use of individual students at their request." *Ibid.*, footnote 6. This is not the case under Act 195.

The crux of the matter is that Act 195 encompasses schools whose purpose it is to advance religion. In order to achieve this purpose, the schools must provide instruction in secular subjects. Part of the budget of the schools is the expenditure of funds for instructional materials. When the State supplies these schools with the materials, the effect thereof is to advance religion to the same extent as if it provided them with funds to purchase the materials or reimbursed parents for the tuition paid by them to the schools to enable the latter to purchase the materials. In short, it constitutes a State subsidy for the operations of religious schools. This, we submit, the Establishment Clause forbids.

Moreover, unlike textbooks, much of the instructional materials referred to in Act 195 can easily be used for religious purposes. For example, the record in *DiCenso* indicates that the teachers in the Rhode Island parochial schools are advised "to stimulate interest in religious vocations and missionary work" (403 U. S. at 618). There is no reason to believe that the same is not true in parochial schools outside of Rhode Island, including those of Pennsylvania, particularly at the high school level and particularly today when there is a growing shortage and hence a greater need for priests and sisters. Maps, charts and globes, instructional materials specified in Act 195, can easily be used in connection with a recruitment campaign for religious vocations and missionary work. Unlike textbooks, these materials are not self-contained and self-explanatory but are designed to be used in connection with and aid of oral exposition. The only way to prevent their use for religious purposes is through that continuing state surveillance of church school operations which the Establishment Clause forbids.

It is appropriate at this point to quote further from *DiCenso*. The court there said (ibid.):

> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some

to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

We do not assume, however, that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities. But the potential for impermissible fostering of religion is present. The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion * * *.

What the Court said in *DiCenso* is no less applicable here. Pennsylvania, like Rhode Island, cannot "provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts." The State must be certain that subsidized teachers do not inculcate religion or use state-provided instructional materials for that purpose. The State can be certain of this only by continuing surveillance, and this the Religion Clauses forbid.

V.

Act 195: Instructional Equipment.

The District Court determined that, in respect to instructional equipment, Act 195 as written went too far. (The defendants, by not cross-appealing, apparently acquiesced in this determination.) It sought to save this

part of the statute by distinguishing between permissible and non-permissible instructional equipment and allowed such equipment which "from its nature cannot readily be diverted to religious purposes, and is particularly designed or designated for such secular purposes as provided in said statute and its duly promulgated guidelines for the administration of such statute."

We have set forth as an appendix hereto (*infra*, pp. 33-34) the text of the revised guidelines issued by the Commonwealth in compliance with the District Court's decision. An examination of these guidelines requires a conclusion that the District Court's effort to salvage some part of the instructional equipment provisions of Act 195 must be adjudged futile.

In *Levitt v. Committee for Public Education and Religious Liberty, supra*, the Court held unconstitutional a statute providing public funds for the purchase of such secular and nonideological materials as heating fuel and electricity for use in church schools. If it advances religion to appropriate public funds for this purpose, we fail to see how it does not advance religion to provide funds for the purchase of the type of instructional equipment permitted by the District Court, and if this is so it is no less an advancement of religion to provide the equipment itself. The point is that the purpose of both the New York statute invalidated in *Levitt* and Act 195 (as well, of course, of 194) is to help finance the ordinary, everyday expenses of maintaining and operating a church school. It need hardly be added that this may not be done consistently with the Religion Clauses of the First Amendment.

There is another aspect of the instructional equipment provisions of Act 195 which manifests their unconstitutionality. An examination of the revised guidelines shows that with moderate resourcefulness much of the

permissible equipment can be used for religious purposes or be converted for such use. For example, the guidelines allow "industrial arts equipment;" but such equipment can be used to construct crosses, crucifixes and altars, and it is a fair guess that in many church schools they are used, *inter alia*, for exactly those purposes. Similarly, storage cabinets and carts, permitted by the guidelines, can be used to store and move religious materials, and here, too, we are certain that they are used for these purposes. The only way to safeguard against this, and the decisions of this Court have made it clear that the First Amendment requires such safeguards, is that continuing surveillance which the Amendment itself forbids.

CONCLUSION.

If, as we urge, the Court rules Acts 194 and 195 unconstitutional in their entirety, it will close up another loophole sought to be placed by ingenious legislators and lawyers for church schools in the wall separating public funds from religion. This, however, is exactly what the generation that wrote the Religion Clauses into the First Amendment intended, and what this Court's decisions show that it has intended and still intends. Certainly, the Court has not intended that windows shall be opened where the Constitutional fathers sought firmly to lock the door. If the result seems harsh, we point out that we do not challenge the right of parochial school children to obtain the auxiliary services provided by the statutes or the constitutional authority of the Commonwealth to provide those services to them. We challenge only the power to supply the services on church-owned and church-controlled premises as part of the program of parochial school education under church sponsorship. We recognize that requiring the children to come to publicly controlled

neutral premises to receive publicly administered services may be less convenient than the form of administration authorized by the statutes. But, this is no less true with respect to any of the numerous forms of aid that the Court has ruled unconstitutional. In these cases, the Court has judged that the First Amendment values of the mutual independence of church and state and the continued integrity of both require that a choice be made between publicly financed services under public auspices and privately financed services under church auspices.

For the reasons stated, the decision of the District Court should be reversed and Acts 194 and 195 be declared unconstitutional in their entirety.

Respectfully submitted,

WILLIAM P. THORN,
LEO PFEFFER,
Attorneys for Appellants.

November, 1974.

APPENDIX A.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION
HARRISBURG, PENNSYLVANIA

Revisions to the Guidelines for the Administration of Acts 194 and 195 (Session of 1972, the General Assembly).

Section 1.13 of the Guidelines for the administration of Acts 194 and 195 is hereby amended to read:

"1.13 Instructional Equipment

A. Instructional Equipment shall mean instructional equipment, as hereinafter set forth, which from its nature cannot readily be diverted to religious purposes *and* is particularly designed or designated for secular educational purposes:

1. science and science laboratory equipment (including micro projectors, which are projectors used to magnify microscope slides);

2. mathematics equipment, including equipment, models and tools used for counting, computing, diagraming and measuring;

3. industrial arts equipment (except any such equipment which may be used in the preparation of printed, reproduced or copied materials);

4. physical education equipment;

5. home economics equipment, such as stoves, refrigerators, sewing machines and utility-type home economics equipment;

6. driver education equipment;

7 Tachistoscopic devices (reading pacers and devic s used to improve the students' reading ability), teaching and reading machines or devices which by their very nature are only capable of accepting commercially prepared secular materials which are specially designed for the particular machine or device;

8. televisions and radios which receive only public and commercial communication (this specifically excludes video tape recording equipment);

9. storage cabinets and carts if furnished as a recommended accessory to a permissible item under this guideline.

B. The term 'instructional equipment' does NOT include projection equipment, duplicating equipment, recording equipment, broadcasting equipment and audio visual production equipment, unless specifically set forth above. The term does not include fixtures annexed to and forming a part of the real estate."

Approved—April 10, 1974.

HERBERT K. SALICK
for JOHN C. PITTENGER,
Secretary of Education.

In the Supreme Court of the United States

October Term, 1973
No. 1765

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL AND AMERICANS FOR SEPARATION OF CHURCH AND STATE,

Appellants

v.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,

Appellees

and

JOSE DIAZ and ENILDA DIAZ, His Wife et al.,

Intervening Parties Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEES PITTENGER AND SLOAN

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OPINION BELOW

The Opinion of the District Court is reported at 374 F. Supp. 639 (E.D. Pa. three judge Court 1974). Copies of the Majority and Dissenting Opinions are set forth in the appendix to the Jurisdictional Statement (hereinafter referred to as J S).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in part:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."

Acts 194 and 195 are set forth in the appendix to Jurisdictional Statement and page references thereto will be preceded by the letters J S. These statutory provisions are reported at Pa. Stat. Ann. tit. 24, Section 9-972 (Supp. 1974).

QUESTIONS PRESENTED

I. Does Act 194, which provides certain defined "auxiliary services" on an individualized basis in nonpublic schools to specific children found to be in need of such services which are beyond those available in a general instructional program, which Act complements other State statutes providing like services to students in public schools, violate the Establishment Clause of the First Amendment to the United States Constitution?

II. Does Act 195 which authorizes the loan of textbooks, instructional materials and instructional equipment (not readily divertible to religious purposes) for the benefit of children enrolled in nonpublic schools, which Act complements other State statutes which provide identical educational aids for the benefit of children in public schools violate the Establishment Clause of the First Amendment?

III. Have appellants met their burden of proving that Acts 194 and 195 are unconstitutional under the Establishment Clause?

STATEMENT OF THE CASE

This appeal challenges the constitutionality of two amendments to the Public School Code of 1949, Pa. Stat. tit. 24, Sections 1-101 et seq., on the ground that these amendments violate the Establishment Clause of the First Amendment. The Public School Code embodies a comprehensive scheme for educating all children of elementary and secondary school age. The specific statutes challenged in this proceeding are Act 194 of July 12, 1972, Pa. Stat. tit. 24, Section 9-972 (Supp. 1974) (hereinafter, "Act 194") and Act 195 of July 12, 1972, Pa. Stat. tit. 24, Section 9-972 (hereinafter, "Act 195").

Act 194 (J S at 108a) states that the Commonwealth will provide specific "auxiliary services" on an individual basis, to those nonpublic school children who require services beyond those available as part of a general instructional program. All the "auxiliary services" authorized by Act 194 are presently provided for public school children. Act 195 (J S at 111a) authorizes the loan to nonpublic school children of textbooks which are acceptable for use in public schools. In addition, Act 195 also authorizes the loan of such instructional equipment and materials as are useful to the education of such children and which are "presently or hereafter provided for public school children" (J S at 113a, 114a). The instructional materials and equipment must be secular, neutral and nonideological in nature.

After a full evidentiary hearing, which detailed the manner in which these State programs operate, a three

judge District Court upheld the constitutionality of Act 194. The Court also upheld the constitutionality of Act 195 with the limitation that the only equipment which could be loaned is equipment which "from its nature cannot be readily diverted to religious purposes" (Final Order, J S at 102a-103a).

SUMMARY OF ARGUMENT

Acts 194 and 195 are two legislative enactments of the Commonwealth of Pennsylvania designed to assure that "every school child in the Commonwealth of Pennsylvania will equitably share in the benefits of" certain specified auxiliary services, as well as textbooks, instructional equipment and materials. The Acts attempt to harmonize educational benefits to public and nonpublic school children in the four areas which they treat. The services and aids provided are purely for the benefit of the school children of this State. These Acts are challenged here as being violative of the Establishment Clause of the First Amendment.

The Acts themselves and the record established in this case clearly demonstrate that the Acts serve a valid and important secular purpose. The innate restrictions on the use of the educational aids which are provided, their self-policing characteristics, firmly establish that the aid provided to school children has been restricted to the secular aspects of education only. Moreover, their self-policing characteristics demonstrate that excessive entanglement by the State in religious affairs is not present. The auxiliary service program, administered by professional public employees, is secular in nature. Limited forms of auxiliary services, not part of the normal instructional programs of the school, are provided to individual students who are in need of them. Such a program does not involve the State in religion and the nonreligious char-

acter of the services cannot be said to advance religion as that term has thus far been defined by this Court.

Appellants argue here that the Acts are unconstitutional and are susceptible to unconstitutional application. Yet, they singularly failed to offer proof to support their conclusions at the evidentiary hearing in the District Court. Important State legislation should not be invalidated on the basis of conjecture. Appellants have failed to establish the unconstitutionality of the Acts or their application.

ARGUMENT

I. Introduction

The instant appeal calls upon this Court to chart, once again, the troubled currents between "the Scylla and Charybdis of 'effect' and 'entanglement'." *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756, 788 (1973). Justice Powell's metaphor is most apt for two reasons. First, the metaphor highlights the inner tension which exists between two of the standards which a statute must meet if it is to be found constitutional under the Establishment Clause. Secondly, it emphasizes that a channel does exist between the two. That channel is not clear, and it is certainly not wide; yet it is submitted that as Jason sailed through the Straits of Messina, so too do Acts 194 and 195 pass both the primary effect and entanglement criteria of the Establishment Clause.

This Court has so often and so recently stated the three requirements which must be met by any statute challenged on Establishment Clause grounds that it will suffice to paraphrase them here. First, the statute must have a secular legislative purpose; second, its principal or primary effect must neither advance nor inhibit religion; and third, the statute must not give rise to excessive government entangelment with religion. *Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971).

In assessing appellants' challenge to these statutes it is important that this Court focus on the specific nature of the four programs countenanced by the two enactments. As this Court said in reserving the Establishment Clause issue raised under the Federal Elementary and Secondary Education Act in *Wheeler v. Barrera*, 94 S. Ct. 2274, 2287-88 (1974), "the First Amendment implications may vary according to the precise contours of the plan that is formulated," and this requires "a careful evaluation of the facts of the particular case."[1] Those facts and the contours of these four state programs have been well defined in the record of this case.

[1] This Court summarily affirmed the judgment of the United States District Court for the District of New Jersey in *Public Funds for Public Schools of New Jersey v. Marburger*, 94 S. Ct. 3163 (1974). The New Jersey programs invalidated in *Marburger* are readily distinguishable from the Pennsylvania programs challenged in this proceeding. The reimbursement features of the New Jersey Act are, of course, akin to the New York reimbursement proposal invalidated in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) whereas Acts 194 and 195, when read *in pari materia* with other provisions of the Public School Code, are remarkably akin to the uniform textbook loan program found constitutional in *Board of Education v. Allen*, 392 U.S. 236 (1968). As to the relative weight to be given to this Court's summary affirmances, see generally *Edelman v. Jordan*, 94 S. Ct. 1347, 1359-60 (1974).

The limited precedential value of *Marburger* is underscored by the fact that the majority opinion of the District Court in the instant case, well aware of the lower court's decision, makes no reference to it in its opinion, and the dissent refers to it only twice and in passing (Dissenting Opinion, J S at 64a, 68a).

The precedential value of *Marburger* is further dissipated by this Court's reservation of the Establishment Clause issue in *Wheeler v. Barrera*, a decision rendered one week before the summary affirmance in *Marburger*, and a case dealing with a federal aid to education program similar in many respects to the Pennsylvania statutes challenged in this appeal.

II. Acts 194 and 195 Serve a Secular Legislative Purpose

Although appellants in the District Court did not dispute that the Pennsylvania Legislature had a legitimate secular purpose in enacting the challenged statutes, nevertheless, appellants now argue that the Acts constitute an effort to provide state funds "for the support of religious and private schools"[2] (Brief for Appellants at 4). Even if appellants' statement properly characterized the legislation, "it is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." *Everson v. Board of Education*, 330 U.S. 1, 7 (1947); *Board of Education v. Allen*, 392 U.S. 236, 247 (1968); *Cochran v. Louisiana State Board of Education*, 281 U.S. 370, 375 (1930); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[2] Appellants also charge that the creators of those statutes—the Governor and the General Assembly of the Commonwealth of Pennsylvania—view the Establishment Clause as a "necessary evil", "a foe, to be evaded and outwitted by whatever stratagem may prove effective" (Brief for Appellants, at 10). This is a shockingly unfair statement, stemming from appellants' dogmatic belief in the rightness of their own position. It is an odd form of argument, indeed: All parties agree that the Establishment Clause is the touchstone by which these State education programs are to be tested. Yet, because the State believes that these programs meet that test, because we view the Establishment Clause as allowing the educational assistance countenanced by these Acts, appellants resort to using labels instead of arguments.

The Acts have just such a purpose. The legislative intent is clearly stated in the Acts' findings: To assure that "every school child in the Commonwealth will equitably share in the benefits" of certain specified auxiliary services, textbooks, instructional equipment and materials. (App. at 109a, 113a) This purpose, moreover, is virtually identical to those contained in the Acts upheld by this Court in *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Board of Education v. Allen*, 392 U.S. 236 (1968). The District Court had little difficulty in concluding that the Acts served a valid secular purpose. That purpose is manifest and appellants have singularly failed to dispute it in the record in this case.

III. The Auxiliary Services Program (Act 194) Meets the Primary Effect and Excessive Entanglement Tests of the Establishment Clause

---

In order to properly determine the constitutionality of Act 194, it is necessary to view the operation of the program itself and thereafter to assess it in the light of the constitutional standards which it must meet.

A. The Auxiliary Service Program

Act 194 defines auxiliary services as:

> ". . . guidance, counseling, and testing services; psychological services; services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth."

The Act authorizes that such services be provided to those children in nonpublic schools who are in need of them. The services are performed by professionals in the various fields of specialization on the facilities of the nonpublic schools. By the terms of the Act, only those auxiliary services which are provided to public school students may be provided to nonpublic school students. Act 194 is administered by the State's Intermediate Units, local administrative agencies which oversee and assist school districts within their respective geographic areas. Pa. Stat. Ann. tit. 24, §§9-951 to 9-971 (Supp. 1974). In providing auxiliary services to nonpublic school students, the Intermediate Units must conform to the School Laws of Pennsylvania, the Regulations of the State Board of Education and the procedures of the Department of Education.

Significantly, the services are performed by employes of the Intermediate Units and not by personnel of the nonpublic schools. The record in this case palpably demonstrates that there is a need for such services by many students in the nonpublic schools. In fact, because such services have not been readily available to nonpublic school students prior to the passage of Act 194, there is presently an even greater need for such services in the nonpublic schools than the public schools, where such services have

long been available (App. at A 65-A 67, A 74-A 75). It is also important to note that the services provided are, of their very nature, provided on an individual basis to particular children who are determined to be in need of them. The nature of the services provided demonstrates that the services are above and beyond what would normally be available as part of a general instructional program. Hence, the program is truly "auxiliary" in nature and not a part of the nonpublic school's general instructional program.

B. Primary Effect

The District Court, in its opinion, reviewed this Court's recent decisions under the primary effect test. The Court noted that this Court had found State educational programs invalid under the primary effect test in *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and *Sloan v. Lemon*, 413 U.S. 825 (1973), whereas such legislation had been sustained by this Court under the primary effect test in *Board of Education v. Allen*, 392 U.S. 236 (1968); *Tilton v. Richardson*, 403 U.S. 672 (1971) and *Hunt v. McNair*, 413 U.S. 734 (1973).

A review of these decisions led the District Court to conclude that State expenditures violate the primary effect test if:

> "1. the payment is made directly to a sectarian school and is not effectively restricted to use by that school for secular nonreligious purposes, or
>
> 2. the payment is made directly to parents as a reimbursement for expenses incurred in sending children to a sectarian school and the payment is not effectively restricted to reimbursement for expenses for identifiable secular nonsectarian pupil activities or needs." (J S at 19a-20a.)

Conversely, the Court noted that such expeditures did not violate the primary effect test:

> "1. if, although the payment is made directly to a parent, it reimburses the parent for an expense of a pupil activity clearly identifiable as secular or nonreligious, or
>
> "2. if, although a property or service is furnished directly to a student, it is clearly identifiable as a secular or nonreligious property or service, or
>
> 3. if, although a payment or service is furnished directly to a secular institution its use is effectively restricted to the secular nonreligious activities of the institution." (J S at 21a.)

Chief Justice Burger was even more succinct in placing in focus the parameters of the primary effect test: State educational expenditures will violate the primary effect test where "the aid that will be devoted to secular functions is not *identifiable* and *separable* from aid to sectarian activities." *Levitt*, supra, 413 U.S. at 480 (emphasis supplied). This, of course, is the proper refinement of the primary effect test, for as this Court re-emphasized in *Hunt v. McNair*, supra, 413 U.S. at 743:

> "[T]he Court has not accepted the recurrent argument that all aid is forbidden because aid to one

aspect of an institution frees it to spend its other resources on religious ends.

This same theme was restated in *Nyquist,* supra, 413 U.S. at 775:

> "* * * Of course it is true in each case that the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law. * * *"

Viewing the auxiliary services provided under Act 194 against this standard, it can readily be seen that the aid furnished to children under this program has been "carefully restricted to the purely secular side of church affiliated institutions". *Sloan v. Lemon,* 413 U.S. 825, 832 (1973) [3]

Appellants argue, however, that the auxiliary service program is open-ended and hence constitutes a subsidy of the normal operations of nonpublic schools. They

[3] This Court in *Sloan* was also concerned that the tuition reimbursement plan there at issue conferred a special benefit on one class of citizens. Of course, that concern cannot be present here. Act 194 merely provides to nonpublic school students those services which have been provided, for some time, to children in public schools. Hence, insofar as auxiliary services are concerned, all school children are being treated uniformly and no special class or group is being singled out for benefits.

predicate their argument on a utopian portrait of a school system wherein "Every school, as part of its normal operations, provides instructional services to below grade level students to bring them up to grade level and to assist them to perform at the grade level for their age and potential" (Brief for Appellants at 15). Appellants thus argue that such services are nothing more than a normal part of a school's operating budget. This argument is facially unsound. Appellants are, in effect, saying that there is no such thing as an "auxiliary" service in education. The record simply does not support such a bold assertion, nor does it support the specific assertion that the providing of individual assistance to children requiring services beyond that available in a general instructional program is part of the normal operating costs of a school (Majority Opinion, J S at 30a-35a). The record palpably demonstrates that the providing of such services has not been part of the regular school curriculum of the nonpublic schools. Thus, Dr. D. A. Horowitz, Associate Superintendent for Schools for Special Services of the Philadelphia School District, testified that to the best of his knowledge such services were not a part of the normal school curriculum in the nonpublic schools (App. at A74-A75). Moreover, P. D. Stopper, a speech therapist employed by an intermediate unit to render speech therapy services under Act 194, testified:

> "Q. Now, therefore, you find that there are children who need speech therapy in both public and nonpublic schools?
>
> A. That is correct. I do find, though, that there is a greater need in the nonpublic schools, and the reason I say that is because it's almost like a fron-

tier. There have not been services—well, there have —let's say there have been services, but they haven't been adequate in any way." (App. at A66)

Significantly, the inadequate services to which the witness referred were the limited services provided—not by the nonpublic schools— but by the Intermediate Units prior to the creation of Act 194 (App. at A67).

Appellants, of course, had an opportunity to cross-examine these witnesses. They failed to do so. They had the opportunity to present their own witnesses to justify their assertion that such services were a normal part of the nonpublic school curriculum. They failed to do so. They now ask this Court to accept their assertions as true in the face of a record which demonstrates that their assertions are not true. This Court should refuse to do so.

C. Excessive Entanglement

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court invalidated a state educational program on the ground of excessive entanglement. In *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Hunt v. McNair*, 413 U.S. 734 (1973), this Court sustained educational legislation on the ground that the programs at issue did not constitute excessive entanglement of government with religion.[4] The District Court opinion thoroughly reviewed these decisions and the legislation challenged in each case (J S at 21a-26a). From that review, it concluded that:

[4] *Board of Education v. Allen*, 392 U.S. 236 (1968), antedates this Court's express statement of the excessive entanglement criterion. Yet the *Allen* Court implicitly rejected an attack on that ground. *Id.* at 245.

"* * * a statute authorizing expenditures for education will be held to involve undue entanglement between government and religion if (a) it authorizes the payment of money or the furnishing of materials or facilities to a religious institution, and (b) the purpose of the payment or the nature of the materials or the facilities, and the character of the institution, are such that the government, in order to assure only secular use of the payment, materials or facilities, will be required to be involved in the internal operations of the institution, both religious and secular, on a continuing basis. But a statute authorizing expenditure for education will not be held to involve undue entanglement between government and religion even though it authorizes the payment of money or the furnishing of materials, equipment or facilities to a religious institution, if the expenditure is limited to secular uses and if from the character of the institution, the purpose of the payment and the nature of the materials or facilities we find that it will not be necessary, in order to assure only secular use, for government to be involved in the internal operations of the institution secular and religious, on a continuing basis. * * *" (J S at 26a)

That conclusion contains an excellent synthesis of this Court's decisions under the excessive entanglement standard. On the basis of that conclusion the District Court held that the auxiliary services program did not lead to excessive entanglement.

Appellants argue. however, that the auxiliary services program is so open ended that it would allow the state to furnish teachers for the general instructional pro-

gram of the nonpublic schools. This might be a colorable argument were the appellants arguing in opposition to a motion to dismiss for failure to state a claim for relief. Yet, here appellants have had their day in court, have had the opportunity to support their argument with proof. Appellants offered no evidence which might lead a court to conclude that the Act was susceptible to such an open ended construction. The Guidelines issued by the State Education Department are precise in defining the types of services which may be provided under Act 194 (Exhibit P-1, quoted in Majority Opinion, J S at 29a-30a). On their face, they reveal no intent to go beyond the services authorized under the statute. Moreover, it is necessary to bear in mind that the services authorized by the Act for nonpublic school students have been provided for some time to public school students and those services did not include providing teachers for the general instructional program of the public schools.

Appellants argue that *Lemon v. Kurtzman*, 403 U.S. 602 (1971), should control here since "comprehensive, discriminating and continuing state surveillance" (403 U.S. at 619) will be necessary in order to insure that public employes do not inculcate religion. Appellants' reliance on *Lemon* is misplaced. The very essence of the *Lemon* decision was the recognition that the State could not adequately insure that parochial school teachers were not inculcating religion unless the State had a comprehensive system of surveillance which would violate the entanglement principle of the Establishment Clause:

> ". . . The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. . . .
>
> ". . . We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. . . ." *Id.* at 618.

Act No. 194, on the other hand, is administered by public employees only. Moreover, in the hiring of those public employees, the State is bound by the mandate of Pa. Stat. Ann. tit. 24, Section 1-108:

> "No religious or political test or qualification shall be required of any director, visitor, superintendent, teacher, or other officer, appointee, or employe in the public schools of this Commonwealth."

The surveillance requirement found necessary in *Lemon* to protect against the deliberate or unintentional inculcation of religion by teachers in the employ of religious schools is obviated entirely by the simple fact that public employees—and only public employees— administer Act 194:

> "The notion that by setting foot inside a sectarian school a professional therapist or counsellor will succumb to sectarianization of his or her professional work is not supported by any evidence." (Majority Opinion, J S at 39a.)

The Intermediate Units are charged with administering Act 194. They are equally charged with providing auxiliary services to public school students. Obviously,

they will exercise the same degree of control over those professionals who serve nonpublic school students as they do over those working with public school students. Hence, "no continuing audit of the nonpublic schools' general instructional program or of their finances is necessary to insure that the services provided remain secular and nonideological" (Majority Opinion, J S at 39a).

The Auxiliary Service Program, on its face and as applied is constitutional under the Establishment Clause.

IV. The Textbook Loan Program Meets the Primary Effect and Excessive Entanglement Tests of the Establishment Clause

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The three judge District Court was unanimous in upholding the constitutionality of the textbook loan provision of Act 195. The reason for this unanimity was, of course, this Court's decision in *Board of Education v. Allen*, 392 U.S. 236 (1968), which upheld against Establishment Clause attack a New York statute authorizing the loan of textbooks to all children enrolled in public and nonpublic schools.

Appellants here urge this Court to overrule its *Allen* holding. They argue that the loan of textbooks to children in nonpublic schools constitutes state financial support of religious activities or institutions. Their argument is undercut by two obvious facts. First, in virtually every educational expenditure case decided under the Establishment Clause since *Allen*, this Court has reaffirmed the vitality of that decision.[5] Furthermore, this Court has repeatedly stated that state expenditures for education are permissible where care is taken to assure that assistance is "properly confined to the secular functions of sectarian schools." *Norwood v. Harrison*, 413 U.S. 455, 468 (1973). It cannot be said that the loan of textbooks to nonpublic school students "aids religion" as that term has thus far been defined by this Court.

A. The Textbook Loan Program

Act 195 defines textbooks as:

> "* * * books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group. Such textbooks shall be textbooks which are acceptable for use in any public, elementary, or secondary school of the Commonwealth." (J S at 114a)

The guidelines promulgated by the Department of Education pursuant to Act 195 provide that each nonpublic

---

[5] *Lemon v. Kurtzman*, 403 U.S. 602, 616-17 (1971); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 782 (1973); *Hunt v. McNair*, 413 U.S. 734, 746-47, n. 8 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472, 481 (1973). See also, *Walz v. Tax Commission*, 397 U.S. 664, 672 (1970).

school shall submit a loan request for desired textbooks to the Department of Education (Exhibit P-1, §4.3). The Department consolidates loan requests and purchases the textbooks according to Commonwealth purchasing procedures (Exhibit P-1, §4.5). Textbooks are shipped directly from the publishers to the appropriate nonpublic school (Exhibit P-1, §4.6). Since the State retains ownership of the textbooks, the State alone is responsible for "fiscal control, fund accounting and maintaining records for the acquisition of the 'textbooks' " (Exhibit P-1, §4.7). The textbooks loaned to nonpublic schools are to be maintained on an inventory by the nonpublic school and on a Statewide inventory by the Division of School Libraries of the Department of Education (Exhibit P-1, §4.10). To assure that the textbooks requested by the nonpublic schools are in fact being sought at the request of individual students in those schools, the Guidelines further require that the nonpublic schools maintain in their files the "certificates of requests from parents of children for all textbook materials loaned to them under this act." That file must be open for inspection. A letter certifying that such certificates are on file must accompany all loan requests.

B. Primary Effect

The textbook loan program under Act 195 is strikingly akin to the textbook loan program approved by this Court in *Allen*. In enacting Act 195, Pennsylvania recognized that textbooks had been provided to public school children without charge for a long time. By this legislation the State seeks to equalize the availability of these

educational aids to all children in the state.[6] In *Allen*, the statute on its face provided free textbooks to children in all schools. Act 195 authorizes providing textbooks to children in nonpublic schools. But that Act must be considered together with Section 801 of the Public School Code of 1949, Pa. Stat. Ann. tit. 24, §8-801, which has for some time authorized providing textbooks for children in public schools. The two Pennsylvania enactments accomplish the same purpose as the one New York statute.

Thus, it can equally be said of Act 195, when read together with Section 801:

> "The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." *Allen*, supra, 392 U.S. at 243-44.

This Court reached this conclusion in light of New York procedures which permitted private schools to submit to boards of education summaries of the requests for textbooks filed by individual students and permitted private schools to store on their premises the textbooks being loaned to the students (392 U.S. at 244, n. 6), since it deemed the paramount and uncontroverted fact to be

---

[6] As the legislative finding to Act 195 makes clear, Pennsylvania has for some time directed local school boards to furnish textbooks and educational equipment, supplies and appliances free of charge for use in the public schools of the districts. Public School Code of 1949, Pa. Stat. Ann. tit. 24, §8-801.

that "the books are furnished for the use of individual students and at their request." *Id.*

Significantly the Complaint here does not even allege that religious books are being or will be loaned to nonpublic school students (cf. *Allen*, supra, 392 U.S. at 244). The Act only authorizes the loan of textbooks "which are acceptable for use" in public schools. Since school authorities, by virtue of their offices, must necessarily determine whether a given book is secular or religious when they select textbooks for use in *public* schools, it is impossible to conclude either that they are unable to so distinguish when reviewing requests from nonpublic school students or that they will not honestly discharge their duties under the law. 392 U.S. at 245. As Chief Burger observed in *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971):

> "In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable. . . ."

Appellants in their brief have made many of the same arguments which were advanced and rejected in *Allen*. Moreover, their attempts to distinguish *Allen* are of a *de minimis* nature. The *Allen* decision remains vital and Pennsylvania's textbook loan program is well within the scope of permissible state action under that holding.

C. Excessive Entanglement

Appellants argue that the textbook loan program gives rise to "comprehensive, discriminating, continuing state surveillance" and as such inextricably binds up the state in the religious affairs of nonpublic schools. Since

only secular textbooks are loaned and since the Guidelines contemplate only minimum contact between the state and the schools (Exhibit P-1) and since by the very secular nature of the textbooks loaned those contacts will be limited to matters of a nonreligious nature, there is no basis on which to conclude that this program could ever give rise to excessive entanglement by the State in the religious mission of the nonpublic schools.

V. The Instructional Materials Program Meets the Primary Effect and Excessive Entanglement Tests of the Establishment Clause

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The instructional materials provision of Act 195 is so much akin to the textbook loan provision of the Act that, for purposes of analysis, it is more appropriate to discuss those aspects of the program which differ from the textbook program and demonstrate how those differences do not render the program unconstitutional.

A. The Instructional Materials Program

Act 195 provides the following definition of instructional material:

> " 'Instructional materials' means books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparencies, films, filmstrips, kinescopes,

> and video tapes, or any other printed and published materials of a similar nature made by any method now developed or hereafter to be developed. The term includes such other secular, neutral, nonideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." (J S at 113a-114a)

The loan of such materials is made to nonpublic schools "on behalf of nonpublic school pupils". The materials loaned must be "useful to the education of such children." Moreover, the materials loaned are limited to those items which "are presently or hereafter provided for public school children of the Commonwealth".

The intermediate units are the responsible agencies for providing such aids to children in nonpublic schools in the areas served by such units (Exhibit P-1, §3.1). Each nonpublic school submits a loan request for the desired instructional materials to the intermediate unit in the area where the nonpublic school is located. The intermediate unit consolidates such requests from all nonpublic schools in its area and orders the equipment for such schools (Exhibit P-1, §3.15). Both the nonpublic school and the local intermediate unit are required to keep an inventory of the instructional equipment and materials loaned (Exhibit P-1, §3.16). Each nonpublic school is required to submit to the local intermediate unit an inventory of all such equipment and materials loaned on or before June 1 of each fiscal year and each intermediate unit is required to submit a composite inventory of such items loaned to all nonpublic schools within its

area to the Secretary of Education by June 30 of each fiscal year (Exhibit P-1, §3.16).

B. Primary Effect

As the District Court concluded, this program differs in only two respects from the textbook loan provision which it unanimously held constitutional: (1) the nature of the materials loaned, and (2) the recipient of the loan (Majority Opinion, J S at 42a). Instructional materials differ in degree but certainly not in kind from textbooks as teaching tools. A textbook of its very nature is suitable for use by an individual student. The materials authorized to be loaned are, of their very nature, suitable for the group use. Yet, the content of both is readily ascertainable. Moreover, the content of the instructional materials is ascertainable in advance, prior to the loan of the materials to the nonpublic schools. Furthermore, only those materials which are acceptable for use in public schools can be loaned under the statute. It can be said of instructional materials, just as this Court said of textbooks in *Allen:*

> *"Absent evidence,* we cannot assume that school authorities, who constantly face the same problem in selecting [instructional materials] for use in public schools, are unable to distinguish between secular and religious [instructional materials] or that they will not honestly discharge their duties under the law." (Emphasis added.) *Allen*, supra, 392 U.S. at 245.

Significantly, appellants make no argument that the materials loaned are religious in nature! They do make

the "recurrent argument" (*Hunt v. McNair*, supra, 413 U.S. at 743), that the program is unconstitutional because assistance provided to the secular aspect of an institution frees it to use its resources in pursuit of religious goals. This Court has invariably rejected that argument. *Allen*, supra; *Hunt v. McNair*, supra.

The recipients of the loan of instructional materials are the nonpublic schools, but this is for the simple reason that the materials themselves are intended for group and not individual use. The materials are for the benefit of the students and are self-policing. The mere presence of secular materials in the nonpublic schools is of no constitutional significance. Moreover, the District Court makes the salient point that this Court's decisions in *Tilton* and *Hunt v. McNair* "teach that the religious institution's *possession* of the property granted under a school aid statute is not alone significant." (Emphasis added.) (Majority Opinion, J S at 45a.) Possession, of course, is constitutionally irrelevant, where, because of the nature of the property loaned, the property cannot be used for religious ends.

C. Excessive Entanglement

Appellants argue that the loaning of instructional materials will require undue and excessive involvement by the state in religious matters in order for the State to assure that those materials are used only for non-religious purposes. They suggest that maps and globes could be used "in connection with a recruitment campaign for religious vocations and missionary work" (Brief

for Appellants at 27). Putting to one side the limited utility of such a means for such an end, and assuming that appellants are genuinely concerned about such an occurrence, the question remains whether this Court's opinion in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), compels the conclusion suggested by appellants.

Lemon v. Kurtzman dealt with a state aid program whereby the state subsidized teachers who taught certain secular courses in nonpublic schools. This Court found the program unconstitutional because the required State supervision necessary to insure that the teachers remained religiously neutral in teaching secular courses gave rise to "comprehensive, discriminating and continuing state surveillance", *Id.* at 619. This Court in *Lemon* was concerned about the unconscious and unintentional manner by which a parochial school teacher, acting in good faith, might inculcate religion in the teaching of a secular course. This Court was not concerned—and on the record before it, just as on the record in this case, could have no basis for concern—that nonpublic school teachers would act in bad faith or with a "conscious design to evade the limitations imposed by the statute and the First Amendment." *Id.* at 618. Yet, in the above example, this is just what appellants are suggesting—conscious and deliberate use of materials for other than their intended purpose. Absent proof of such bad faith (and there is none in this record; see, for example, App. at A92), appellants' argument must fail.

VI. The Instructional Equipment Program Meets the Primary Effect and Excessive Entanglement Tests Under the Establishment Clause

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The District Court, in reviewing Act 195's instructional equipment program, concluded that the definition of the types of equipment which could be loaned was overly broad in that some of the equipment loaned could be easily divertible to a religious purpose. The Court directed the State to prepare a new guideline which would limit the definition of instructional equipment to only those types of equipment which could not readily be divertible to a religious purpose. The State has done so and that guideline is appended to appellants' brief (Brief for Appellants at 33-34). The administration of the program is identical to the administration of the instructional materials program (see supra, V, A).

A. Primary Effect

Appellants argue that loaning the limited types of equipment now authorized under the new guideline is no different than granting monies to nonpublic schools for paying for heating fuel in such schools. They rely on *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). In *Nyquist*, this Court invalidated New York's "maintenance and repair" statute which authorized grants totaling $30 to $40 per pupil directly to sectarian schools with no effective restriction on the *use* to which the maintenance and repair funds could be put. As Justice Powell noted, "No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes . . ." *Id.* at 774. The touchstone of the Court's analysis was the lack of restrictions on use. Here, the restrictions on use are innate. The equipment which can be loaned is self-policing. It cannot be used for other than its intended purpose. The purpose is purely secular, as even a most cursory review of the amended guideline will reveal. Since the aid, then, is clearly "identifiable and separable from aid to sectarian activities" (*Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472, 480 (1973)), the primary effect of the instructional equipment program cannot be said to advance religion.

B. Excessive Entanglement

Appellants argue that State surveillance will, nevertheless, be necessary to assure that the shop classes of the nonpublic schools are not using industrial arts equipment to build crosses and altars. They argue, moreover, that such surveillance will be necessary to be sure that a storage cabinet "furnished as a recommended accessory to a permissible item under this guideline" (Amended Guideline, Brief for Appellant at 34) will not be used to store religious materials. This is truly "giving free rein to the imagination" (Majority Opinion, J S at 46a). Appellants say these things could be accomplished with "moderate resourcefulness" (Brief for Appellants, p. 29). Moderate resourcefulness, indeed! They are suggesting manifest bad faith on the part of teachers in nonpublic schools. As this Court made clear in *Tilton v. Richardson*, 403 U.S. 672, 679 (1971):

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. . . . But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional."

Appellants failed to produce any evidence that the purpose of the Act had been subverted in the way they suggest. Absent evidence, this Court should be loath to invalidate important educational legislation on the basis of appellants' unsupported conjectures.

VII. Acts 194 and 195 Do Not Generate the Possibility of Political Divisiveness Along Religious Lines

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Appellants have argued that Acts 194 and 195 give rise to political divisiveness along religious lines. As a matter of proof, appellants have introduced no evidence to support their claim. As a matter of law, this Court has taken the view that the possibility of such divisiveness is a cumulative factor to be weighed in the constitutional balance. Standing alone, the mere possibility of such divisiveness is insufficient to invalidate otherwise constitutional State action. This Court recently noted that the "prospect of such divisiveness may not alone warrant the invalidation of State laws that otherwise survive the careful scrutiny required by the decisions of this Court." *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 797-98 (1973).

Since the District Court concluded that the instant legislation was constitutional, under all of the standards announced by this Court, it was loath to conclude, as a matter of law, that the possibility of such divisiveness was present here, or, for that matter, that its decision, whether upholding or invalidating this legislation, would in some way render the underlying issue less divisive.

Since the legislation here challenged is constitutional under this Court's tripartite test, appellants' divisiveness argument, standing alone, offers no basis on which to nullify this legislation.

VIII. Appellants Have Failed To Prove That Acts 194 and 195 Violate the Establishment Clause

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Throughout this brief, great emphasis has been placed on appellants' singular failure to come forward with proof to support their conclusory allegations. It is most appropriate that due emphasis be given to this matter. At issue here are two legislative enactments of the Commonwealth of Pennsylvania. Cases arising under the Establishment Clause warrant no different approach than other cases challenging the constitutionality of state statutes: it is the plaintiff's burden to establish unconstitutionality and not the State's burden to prove constitutionality. This Court itself has stressed this important fact in *Allen* and *Hunt v. McNair*. Appellants would have this Court assume that many nonpublic schools in the State are "pervasively sectarian" (*Hunt v. McNair*, supra, 413 U.S. at 743). Yet appellants have failed to introduce a scintilla of evidence on this score.

In paragraph 8 of their complaint, appellants attempted to characterize the nonpublic schools in which students would receive the benefits provided by Acts 194 and 195 (App. at A6-A7). Defendants specifically denied that characterization (App. at A27, A30). At the evidentiary hearing held in this case, appellants' counsel asked a series of hypothetical questions of the Coordinator of Nonpublic School Services in an attempt to determine whether the State makes any inquiry as to the degree of religiosity of the nonpublic schools. The witnesses stated that the state makes no such inquiry and, in fact, as to one of appellants' questions, stated that he did not know of any schools that impose religious restrictions on admissions (App. at A48). Judge Gibbons correctly summarized the testimony on this point:

> "He has testified that he makes no such inquiry with respect to each of the areas of inquiry Mr. Pfeffer asked about. That's his only testimony so far." (App. at A50)

Yet from this, appellants have argued in their jurisdictional statement (J S at 5) and in their brief (Brief for Appellants, at 4, 18) that appellees "concede" that schools possessing the ten religious characteristics enumerated in paragraph 8 of their complaint (App., pp. A6-A7) are eligible for benefits under Acts 194 and 195). That argument is untrue and unsound, for it assumes as a fact something which appellants had the full opportunity to *prove* as a fact but something they completely failed to establish—that schools possessing those characteristics do, in fact, exist. Appellees, in their pleading denied this characterization of the schools. It was, then, appellants'

burden to prove that such schools do exist, and this they completely failed to do. The only witness they produced frankly admitted that he did not know whether such schools exist (App. p. A48). Appellants in their brief to this Court make their arguments as though this matter were on appeal from the granting of a motion to dismiss, where all the allegations of their complaint must be taken as true. In this, they err egregiously. In the first place, a record has been established in this case. Appellants had a full opportunity in the creation of this record, to attempt to prove those matters which they blithely request this Court to assume as true. Thus, it can be said of appellants just as it was said in *Hunt v. McNair,* supra, 413 U.S. at 743:

> "Appellant has introduced no evidence in the present case placing the [nonpublic schools] in such a category."

The same failure of proof was present in *Tilton v. Richardson,* 403 U.S. 672, 682, wherein this Court refused to invalidate important educational legislation "on the basis of a hypothetical 'profile' " of the various participating schools.

Just as this Court has required more from the State than a "mere statistical judgment" (*Committee for Public Education and Religious Liberty v. Nyquist,* supra, 413 U.S. at 778), to assure that State funds will not be used to finance religious education, so too must this Court require more of those who would challenge State action than an unproven characterization of the nonpublic schools of Pennsylvania.

CONCLUSION

It is respectfully submitted that this Court should affirm the judgment below.

Respectfully submitted,
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Dated: December 19, 1974.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1765.

SYLVIA MEEK, et al.,

Appellants,

v.

JOHN C. PITTENGER, et al.,

Appellees,

and

JOSE DIAZ, et al.,

Intervening Parties Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 73-1765.

SYLVIA MEEK, ET AL.,
Appellants,

v.

JOHN C. PITTENGER, ET AL.,
Appellees,

AND

JOSE DIAZ, ET AL.,
Intervening Parties Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLEES JOSE DIAZ, ET AL.

OPINIONS BELOW.

The majority and dissenting opinions of the District Court are reported at 374 F. Supp. 639 and appear as appendices to the Jurisdictional Statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States, amendment I:

"Congress shall make no law respecting an establishment of religion. . . ."

Act of July 12, 1972, P. L. —, No. 194, Pa. Stat. Ann. tit. 24, Section 9-972 (Supp. 1974).

Act of July 12, 1972, P. L. —, No. 195, Pa. Stat. Ann. tit. 24, Section 9-972 (Supp. 1974).

QUESTIONS PRESENTED.

This appeal presents the following questions:

1. May Pennsylvania, consistently with the Establishment Clause of the First Amendment, provide to children, within the nonpublic (including religious) schools where they are lawfully enrolled, such public welfare benefits as speech, remedial and like services (Act 194) and the use of loaned secular, neutral, non-ideological instructional materials (Act 195)?

2. May such children be denied those benefits, their parents the liberty of choice in education which is aided by the Acts, and the state its choice of means for the achievement of its educational objectives, solely on the ground that the benefits are received by the children in schools wherein they lawfully fulfill a duty of religious conscience?

COUNTERSTATEMENT OF THE CASE.

In Appellants' Statement of the Case, at Page 4 of their Brief, it is stated that "Appellees concede" that included as eligible under the Acts are schools having certain characteristics—among th se religiously restrictive admissions and faculty appointment policies, imposition of requirements of attendance at religious instruction a.d worship, and religious restrictions on what faculties may teach. These allegations were specifically denied by the Commonwealth and by Intervenor Appellees Diaz, *et al.* in their Answers (A27, A30) and remain today both denied and unproved.

Act 194 provides that defined auxiliary services (*e.g.*, guidance, psychological, speech and hearing services) shall be rendered by state employes directly to nonpublic school children in the schools attended by the latter. This program has been in effect throughout the Commonwealth since July, 1972.

Act 195 provides (a) for the loan of state-approved textbooks, upon individual request, to nonpublic school children (b) for the loan to nonpublic schools of such secular, neutral, non-ideological instructional materials (*e.g.*, maps, charts, slides) and instructional equipment (*e.g.*, physical education equipment, laboratory equipment) as are of benefit to the instruction of nonpublic school children and are provided for Pennsylvania's public school children.

Both Acts are amendments to the Public School Code, the General Assembly noting, in its findi gs, that the Commonwealth had already provided such services and materials to public school children, and that it is the intent of the legislature to assure the providing of these so that "every school child in the Commonwealth will equitably share in the benefits thereof." (A12, A18).

These enactments were challenged by Appellants on the ground that they are unconstitutional, on their face and as applied, as contravening the Free Exercise and Establishment Clauses of the First Amendment. Following Answer by parties Defendant (in which Intervenor Defendants Diaz, *et al.*, raised affirmative constitutional defenses), a trial ensued on Appellants' motion for an injunction. Testimony was taken from ten witnesses. After both sides had rested, Appellants moved to amend their Complaint to limit it to an attack on the statutes on their face, so as to eliminate any res adjudicata effect of a judgment insofar as the Acts were construed and applied by the Commonwealth (JS 13a).[1] The motion was denied. Appellants were offered the opportunity to supplement the testimony, but elected to rest on the record (JS 5a).

The District Court, following trial, on the basis of the pleadings, the stipulations and the evidence presented at trial, on February 14, 1974, handed down an opinion comprising its findings of fact and conclusions of law. The court denied Appellants' application for an injunction against the expenditure of Commonwealth funds pursuant to Act 194. The court granted their request for an injunction with respect to Act 195 but only to the extent of barring loans of such instructional equipment as can, from its nature, be readily diverted to religious purposes.

The court in its opinion noted that the Public School Code "evidences the strong public policy of the Commonwealth that every child of compulsory school age be educated for functional adult citizenship to the level of minimum state standards" and that the challenged Acts are in furtherance of that policy (JS 7a). It pointed out that all the services provided under the legislation "are presently provided for public school children at public expense."

1. The signal "JS" refers to materials to be found in the Jurisdictional Statement.

(JS 8a). Reviewing the decisions of the Supreme Court in Establishment Clause cases, both with respect to tests of "primary effect" and "entanglement", it concluded that state expenditures for education would not violate the primary effect test

> "1. if, although the payment is made directly to a parent, it reimburses the parent for an expense of a pupil activity clearly identifiable as secular or nonreligious, or
>
> "2. if, although a property or service is furnished directly to a student, it is clearly identifiable as a secular or nonreligious property or service, or
>
> "3. if, although a payment or service is furnished directly to a secular institution its use is effectively restricted to the secular nonreligious activities of the institution." (JS 21).

Under these guidelines, the District Court held the Auxiliary Services program to have no primary effect advancing religion. The court here relied extensively upon uncontradicted and unchallenged evidence adduced at the trial which, it said, provided "a clear picture of the operation of the act." (JS 28a). The court concluded:

> "We hold that none of the specific auxiliary services listed in Act 194 has the primary effect of aiding religion. Each has the primary effect of meeting the state's primary objective of assuring that individual students receive those individualized services, outside the general program of instruction of their school, necessary for their individual progress in learning. It is true, of course, that a child with vision defects, provided glasses, will be enabled to read the Bible, as a child with hearing defects, provided a hearing aid,

will be enabled to hear the word of God, and as an emotionally disturbed child, given psychological or medical therapy, may become receptive to religious training. But the benefit to religion in such instances is clearly secondary, and such secondary benefit exists no less for children attending public than for children attending nonpublic schools." (JS 36a).

Similarly the court found the Appellants' charges of "entanglement" to be without substance, because the court viewed the proving of entanglement as requiring ". . . a factual inquiry rather than a resort to examination of the face of the statutory issue or to judicial notice about how it may be expected to operate." (JS 24a). Appellants had not produced evidence of entanglement:

> "*There is no evidence whatever that the presence of therapists in the schools will involve them in the religious missions of the schools.* . . . Unlike the programs considered in *Lemon v. Kurtzman,* . . . no continuing audit of the nonpublic schools' general instructional program or of their finances is necessary to insure that the services remain secular and non-ideological. *The notion that by setting foot inside a sectarian school a professional therapist or counselor will succumb to sectarianization of his or her professional work is not supported by any evidence* . . ." (JS 39a. Emphasis supplied.)

The District Court held Act 195's textbook loan program to be controlled by the Supreme Court's decisions in *Board of Education v. Allen,* 392 U. S. 236 (1968) and *Cochran v. Louisiana State Board of Education,* 281 U. S. 370 (1930) and not to involve impermissible entanglements (JS 41a). The court likewise found the provision for the loan of instructional materials, under the same Act, to counter neither the primary effect nor entanglement tests:

> "If the public authorities can be trusted with selecting secular, neutral, nonideological textbooks for use by students in religious schools, they can be trusted to make the same judgment with respect to those instructional materials which in this nonsequential age have to some extent replaced textbooks as teaching media. As with textbooks, this statute is, from the point of view of primary effect, largely self-enforcing since by hypothesis the instructional materials will be the same as are made available in the public schools." (JS 44a).
>
> • • •
>
> "No greater entanglement is required by the operation of the instructional materials loan program than by the textbook loan program." (JS 45a).

The court treated like instructional materials equipment "which from its nature is incapable of diversion to a religious purpose", but held that the loan of other instructional equipment, which could be readily diverted to a religious use, would fail either the primary effect or entanglement test (JS 49a).

The District Court found the Appellants' charge that the Act would produce political division along religious lines to be a matter requiring proof and here unproved. It likewise found to be without substance Appellants' claim of a violation of the Free Exercise Clause.

The court, in upholding Act 194 and Act 195 (except for the severed portion), stressed that, in addition to Establishment Clause considerations, there must be consideration of the "constitutional status of the relationship between the Commonwealth, children, and parents." This, it said, involved (a) a recognition of the state's interests

in the health and education of children and (b) constitutional recognition of liberty of choice in education (JS 27a).

Higginbotham, J., concurred with respect to the textbook loan program of Act 195 but dissented as to the other provisions of that Act and as to Act 194.

SUMMARY OF ARGUMENT.

Acts 194 and 195 extend certain public welfare benefits, related to child health and education (and which have been provided for children in public schools) to children whose taxpayer parents have enrolled them, pursuant to the compulsory attendance laws, in nonpublic (including religious) schools. These benefits consist of secular, neutral, or nonideological services and materials. That these are of immense and direct individual help to individual children is firmly established in the trial record (in addition to the clear declaration of the legislature as to why it passed the Acts).

Appellants nevertheless move this Court to stop Commonwealth speech therapists from coming to children under Act 194, to take away from these children state-approved textbooks and instructional materials loaned them under Act 195, and to stop a slow-reading child from looking at a state-owned pacer in his own school. These things Appellants urge *solely* on the ground that the school wnerein the child receives such benefits is a *religious* school. The Appellants claim that the Establishment Clause requires that, once a child is enrolled in such a school—even though by command of conscience and even though in fulfillment of compulsory attendance requirements—he is rendered ineligible for the good things which public policy says are useful and helpful to all children.

But as the Opinion of the District Court makes clear, the decisions of this Court in Establishment Clause cases present no bar to the Acts in question. Under tests stated by the Supreme Court, the Acts have no primary effect advancing religion and call for no entanglements between the state and religious schools. Appellees totally avoided the opportunity to prove the allegations of their Complaint with respect to those tests.

The Establishment Clause is not to be applied as a cudgel for educational conformity. The decisions of this Court firmly hold that the state cannot exclude any child, because of his faith, from receiving the benefits of public welfare legislation.

ARGUMENT.

I. Appellants' Establishment Clause Claim Is Contradicted by This Court in Allen and by the Factual Record in This Case.

Two points stand out in Appellants' argument on this appeal: their frank demand that the Court overrule its own decision in *Board of Education v. Allen* and their meticulous avoidance of the trial record. The two points are interrelated. Both *Allen* and the trial record stand as roadblocks to Appellants' attempts to secure nullification of Acts 194 and 195. Each upsets Appellants' claims respecting the Establishment Clause—the one by simply spoken constitutional principle, the other by substituting truth for gross imaginings concerning religious schools and the people who teach in them.

1. The relevance of Allen. *Allen* holds that public funds may be used to support a general program for the loan to pupils in nonpublic (including religious) schools of secular instructional items approved for the use of children in public schools. The Court, in *Allen*, directly acknowledges in principle (1) that the instructional items may be used within the premises of a religious school (2) that persons in a religious profession may be involved in the teaching process wherein the instructional items are utilized (3) that the instructional items may be useful or necessary to the carrying on of a school (4) that private (including religious) schools play a significant role in the achieving of legitimate state interests in the educating of children. As can be seen, each of these four factors is found in Act 194 and in Act 195 (considering, in the case of the former, the auxiliary service teacher's service to be roughly comparable to an instructional item "loaned").

As the arguments of the *Allen* appellants vividly showed, every bad result which it is now predicted will surely flow from Acts 194 and 195 was then claimed as sure to flow from this Court's holding that parochial school pupils could constitutionally be let read and handle publicly loaned secular textbooks.[2] The *Allen* claimants warned this Court of the propelling of the nation's liberties beyond the "verge" of safe busing into the void of unsafe reading. There, as here, the appellants divined the mind of the Constitutional fathers who "intended to bar just the type of legislation involved in the present litigation." (Brief, 11[3]). The same ugly charges against the capabilities and ethics of school authorities were leveled, in *Allen*, the same malign insinuations of "strategems" and viewing our Constitution "as an enemy of the people", the same lurid commentaries on the citizenship of religious teachers, and the same finical troublings over such administrative details as request forms, (*cf.*, Brief 24). This Court faced and weighed all of those charges and, even on a record that was meager, was unable to hold that the statute there challenged resulted in "unconstitutional involvement of the State with religious instruction or . . . is a law respecting an establishment of religion . . ." *Board of Education v. Allen*, 392 U. S. 236, 248 (1968). *Allen*, of course, has been repeatedly confirmed in the opinions of this Court. *Tilton v. Richardson*, 403 U. S. 672, 679 (1971), *Committee for Public Education v. Nyquist*, 413 U. S. 756, 775, 37 L. Ed. 2d 948, 964 (1973).

Thus it is clear that the overruling of *Allen* is not useful to Appellants' case merely in the matter of textbooks; it is indispensable to their entire appeal before this Court.

2. See, Brief for Appellants, *Board of Education v. Allen*, Supreme Court of the United States, October Term, 1967, No. 660, 16, 17, 18, 22, 23, 36, 37).

3. "Brief", as herein employed, refers to Brief of Appellants.

2. The relevance of the trial record. In *Allen* this Court refused to strike down, on the basis of judicial notice, a state statute challenged as violating the Establishment Clause:

> "Nothing in this *record* supports the proposition that all textbooks . . . are used by the parochial schools to teach religion. No *evidence* has been offered *about particular schools, particular courses, particular teachers, or particular books.* We are unable to hold *based solely on judicial notice*, that this statute . . . is a law respecting an establishment of religion." (*Allen, supra*, at 248. Emphasis supplied.)

And see *Hunt v. McNair*, 413 U. S. 734, 746 (1973). (The burden of establishing the facts rested with appellant who challenged the expenditure.)

In the present case, Appellants do not merely ask this Court to nullify two state statutes on the basis of judicial notice; incredibly, they want the Court to *ignore* the trial record. From all that can be discovered in the Brief for Appellants, the findings of fact herein (from which dissenting Judge Higginbotham did not except) do not exist.

Appellants hope to make their case before this Court by again inviting the Court to indulge in the sort of supposition (*i.e.*, suspicion) with which, for example, the opinion of the lower court in *Marburger* (which Appellants quote at length) is shot through. This hit-and-run approach, as a means of dealing with the work of legislatures and the interests of children, has the forensic advantage of permitting the delivery of blows without taking the responsibility for them. For example, Appellants' Brief (quoting *Marburger*) *opines* that public teachers offering auxiliary services in religious schools will need surveillance lest they perforce start "reflecting religion". But is that true?

What happens in real life? Is a Lutheran professional psychologist who offers psychological services in a Catholic school in actual danger of starting to "reflect" Catholicism? (A51-A62). The Appellants had every chance in this case to try to prove that ludicrous and demeaning contention. They ducked the chance. Upon the trial they stayed so far away from the world of facts as to scrupulously avoid a single word of cross-examination of the witnesses involved in the program whom Appellees called.

It is high time that the play be called on this approach, which, preferring the twilight gone of cocksure suspicionizing to the light of candid and open examination of real-life people and actual facts, attacks and defames schools, teachers, state officials, persons in religious profession, and indeed the good citizenship of a large part of our American people.

There is in this case a thoroughly developed trial record which relates decisively to every constitutional issue which Appellants themselves have raised. The District Court stated that its opinion, which was based upon the evidence, comprised its findings of fact. Those findings are fundamental to the decision on this appeal.

II. Acts 194 and 195 Make Available to All School Children the Benefits of General Programs of Secular, Neutral, Non-Ideological Services and Materials.

This Court, in *Allen*, noted that the textbook loan program there upheld ". . . merely makes available to all children the benefits of a general program to lend school children books free of charge." *Allen, supra*, at 243. The District Court in the present case similarly found Acts 194 and 195 to extend to all children the benefits of general educational and health related services and instructional

items (JS 7a).[4] The Acts themselves, and the record, fully substantiate the District Court's determination.

The services and materials have long been found important to the education and sound development of children, and have long been previously provided for the benefit of children in public schools. See Pa. Stat. tit. 24, Section 964 (auxiliary services); Pa. Stat. tit. 24, Section 8.801 (textbooks, instructional materials, and instructional equipment). Abundant testimony upon the trial emphasized both the basic importance of these services and instructional items to all children and the unavailability of them, prior to Acts 194 and 195, to children enrolled in nonpublic schools. See testimony of Dr. William D. Boesenhofer (A55-A56), Pauline D. Stopper (A66-A68), David A. Horowitz (A74, A76-A78), May Bense[5] (A95-A97), and Daniel F. X. Powell (A100). This testimony is uncontradicted and uncountered in the record. As in *Allen*, "the record contains no evidence that any of the private schools . . . previously provided textbooks for their students" (*Allen, supra*, at 244, fn. 6), or the services or other instructional items.

III. The District Court Was Correct in Holding the Auxiliary Services Act Constitutional.

The Brief for Appellants presents four objections to Act 194:

1. That it is "open-ended". (Brief, 15-16).

2. That it necessitates "surveillance". (Brief, 16-17).

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4. *Cf., Wolman v. Essex*, — F. Supp. — (D. C. S. D. Ohio, July 1, 1974).

5. Mrs. Bense, the mother of an eight year old deaf child, Johnna, testified that, as the direct result of Johnna's having been able to work with visual remedial materials furnished under Act 195, she was able within one year to transfer from a school for exceptional children to a regular school (A96-A97).

3. That it encompasses schools which have certain "indicia of religiosity". (Brief, 19).

4. That it involves "church and state in sustained administrative relationships". (Brief, 20).

1. Appellants base their charge that the Act is "open-ended" upon its inclusion, in its definition of auxiliary services, of "such other secular, neutral, nonideological services as are of benefit to nonpublic school children . . ." Appellants point out that the "Regulations",[6] Section 1.11, interpret auxiliary services to include bringing pupils below grade to grade level. Bringing pupils below grade to grade level, Appellants conclude, is part of the normal services which a nonpublic school would already have been providing and, therefore, Act 194 relieves religious nonpublic schools of part of their operating costs (with a resulting benefit to religion).

The court below found this contention to be without substance (JS 31a). The argument is not based on fact. Auxiliary services by and large are not mandated as part of basic curriculum requirements in Pennsylvania. See Regulations of State Board of Education, 22 Pa. Code §§ 5.1-5.76. By and large—if not totally—the services are new to the nonpublic school children. The General Assembly made an express finding on that point:

> "Although their parents are taxpayers of the Commonwealth, *these children do not receive auxiliary services from the Commonwealth.* It is the intent of the General Assembly by this enactment to assure the providing of such auxiliary services in such a manner that every school child of the Commonwealth will equitably share in the benefits thereof." Act 194, Section 1. (A12. Emphasis supplied.)

6. Presumably meaning Guidelines for the Administration of Acts 194 and 195.

Indeed as the term, "auxiliary", plainly indicates, and as a reading of the Act's definition plainly shows, the services are exceptional, or supportive, or added to, the "normal operations" of the school. Appellants' argument would render the term meaningless.

Upon the trial, witnesses, whose qualifications to speak to the point were unchallenged and whose testimony was uncontradicted, stated emphatically that Act 194 services were *not* part of the normal operations of nonpublic schools. (See testimony and the District Court's discussion thereof. JS 31a-36a). The court below, based on the Act, the Guidelines, the trial record and good sense, correctly dismissed Appellants' argument.

2. Appellants do not cite any facts to support their claim that Act 194 requires "surveillance" of the public school employes who perform the auxiliary services. They prefer to cite *Marburger,*[7] which likewise rested on no facts but rather on the judgments of judges who "just knew" of the taint of religion that would inevitably attach to the public employe who enters within the precincts of a parochial school. *Marburger,* which Appellants here appropriate, paints the following amazing portrait of the public school professional who goes into a religious school to serve children there through performing one of the special services:

1. He or she "is not a textbook" and has "a substantially different ideological character from books." (Brief, 18-19).

7. *Public Funds for Public Schools of New Jersey v. Marburger,* 358 F. Supp. 29 (1973), *aff'd.* — U. S. —, 94 S. Ct. 3163 (1974), involved a statute which was essentially a parent reimbursement cash subsidy enactment. By Section 7 of the act, the providing of equipment, materials and services is subordinated to the reimbursement provision. There was no provision for loan of textbooks. They were covered solely by reimbursement. There was no evidentiary trial in *Marburger,* and the court therein resorted to assumptions respecting constitutionally critical facts.

2. Though having some sort of "ideological character", he or she will need watching. This is to make sure "that the religious atmosphere has not caused religion to be reflected—*even unintentionally*—in the instruction provided." (Brief, 19).

A worse libel on public school professionals could scarcely be penned. The first part of it—distinguishing teachers from books—is obviously a contrivance to hoist its authors away from *Allen*. In *Allen* the Court took fully into account the fact that books "are critical to the teaching process", *Allen, supra,* at 245. But the teacher, who, under the first part, is endowed with "ideological character", becomes, in the second part, a pliant zombie, lacking will, a mind of his own, personal convictions, character, perceptiveness, faithfulness to his professional standards, or faithfulness to the law of his state and nation.[8]

Since *Marburger* was the mainstay of Appellants in the proceedings below, it appeared appropriate to see whether its presumptions respecting auxiliary service teachers—however fervently believed—were valid. The best and sole way to find out would be to call to the witness stand the very people in question and indeed, to leave them open to the most searching cross-interrogation by those who had advanced the presumptions. The option was, of course, equally open to Appellants: they were free to try to back up their claims with witnesses who would prove the contrary. These things the Appellants chose not to do.

Dr. William D. Boesenhofer, an Intermediate Unit employe performing auxiliary psychological services under Act 194, whose high qualifications as a seasoned professional are set forth upon the record (A51-A52), testified that

8. *Cf.,* testimony of Pauline D. Stopper (A64-A70).

1. Such services are very important to all children. (A55).
2. Children needing psychological services are found in all schools, both public and nonpublic. (A54).
3. Prior to the enactment of Act 194, such services were available to nonpublic school children only in a public school and upon referral. (A56).
4. It is much more desirable for children that the services be rendered on the nonpublic school premises. (A56).
5. He belongs to the Lutheran Church. (A56).
6. He understands that, under Act 194, he is not permitted to reflect any kind of religion in rendering his services in a nonpublic school. (A56).[9]
7. He considers himself bound to obey the laws of the Commonwealth and of the State and Federal Constitutions. (A56).[10]
8. He is guided not only by such legal restraints but also by the ethical standards of the American Psychological Association which prohibit introducing any kind of religion into a psychologist's practice. Therefore ethically he could not reflect or bootleg any religion through his work as a psychologist. (A59).
9. In offering psychological services in nonpublic schools he has never attempted to influence children in favor of the Lutheran faith. (A57).
10. In offering psychological services in nonpublic schools he has never introduced religious ideas, materials, or subject matter. (A57).

9. *Cf.,* testimony of Sr. Mary Dennis Donovan (A91-A92).
10. *Ibid.*

11. Performing psychological services in Catholic schools, he has never encountered any disputes with religious authorities in those schools over the precise meaning and extent of the legal restraints against introduction of religion into his work—nor any kinds of problems. (A57).

12. In performing his services in Catholic schools, he has felt no pressure whatsoever to conform to Catholic or other religious views. (A57).

13. No sort of religious atmosphere in those schools has caused him in any way to start reflecting religion in his work in those schools. (A57).

14. If a child in a Catholic or Moravian school or some other religious school would do better in a public institution, he would recommend a transfer to such institution—and has already done this. (A57-A58).

15. In having made such recommendation, and the recommendation that a child be under a male teacher rather than a nun female teacher, he has encountered no resistance, objection or pressure whatsoever on the part of authorities in the Catholic school. (A58).

To identical effect was the testimony of Pauline Stopper, a state-certified speech therapist employed by Carbon-Lehigh Intermediate Unit and performing auxiliary services (A64-A70). David A. Horowitz, Associate Superintendent for Schools for Special Services in the School District of Philadelphia, with forty years of service in the Philadelphia public schools (A71) and having had eight years of experience in administering auxiliary services provided to nonpublic school children under the federal Elementary and Secondary Education Act (A72-A73), testified:

1. These services are important to all children, to their development, to their education process, to their future vocation. (A74).

2. These services cannot be afforded to nonpublic school children at public centers. (A77-A78).

3. In administering auxiliary services under both ESEA and Act 194 in connection with Catholic schools he knows of no situations wherein religious content or orientation has figured. (A79).

4. His office has fully acquainted both auxiliary service employes and nonpublic school administrators with the legal restraints on religion in the program. (A79-A80).

5. In eight years of involvement in and responsibility for auxiliary services with ESEA, and in connection with Act 194, he knows of no situations or instances wherein the religious atmosphere in a Catholic or other parochial school has caused the auxiliary service teachers in the school to start reflecting religion, even unintentionally, in the instruction they provide. (A80). Had there been any such situations he would have known about them. (A79).

Clearly the record not only fails to support Appellants in their contentions concerning "surveillance" but indeed it firmly establishes that the charge is baseless.

3. As to the program's encompassing schools which have certain indicia of "religiosity", the answer is simple: it aids children in both sectarian and nonsectarian non-

public schools. Certainly, this recycled charge is without vitality. *Bradfield v. Roberts,* 175 U. S. 291, 298 (1899); *Everson v. Board of Education,* 330 U. S. 1, 17 (1947); *Board of Education v. Allen,* 392 U. S. 236, 242 (1968); *Walz v. Tax Commission,* 397 U. S. 664, 672-673 (1970); *Tilton v. Richardson,* 403 U. S. 672, 679 (1971); *Hunt v. McNair,* 413 U. S. 734, 742 (1973).

4. The charge that Act 194 involves church and state in forbidden administrative relationships is in no wise borne out by the terms of the statute and is unsubstantiated by any proof, or even evidence, upon the record. The program had, at the time of trial, been going on for a full year. From February 13, 1973 (the date of the Complaint) onward, the Appellants had publicly maintained and repeated the charge that the program required "excessive governmental entanglement". It is remarkable therefore, that when the time came to put hard proof behind voluble accusation, they took to silence.

The District Court wisely, rightly, and (in terms of the record) inevitably held the Appellants' charge respecting "sustained and detailed administrative relationships" to be baseless (JS 38a-39a).

IV. The District Court Was Correct in Holding Constitutional the Loan of Textbooks and Instructional Materials Under Act 195.

The Brief for Appellants presents objections to the textbook and instructional materials programs:

1. That, to the extent that it is said to be justified by this Court's decision in *Allen,* it is without justification at all, since *Allen* was wrongly decided. (Brief, 20-23).

2. The textbooks are not loaned "upon individual request". (Brief, 24).
3. The nonpublic school is "granted a five percent transportation allowance". (Brief, 24).
4. The textbooks "are not delivered to the children but to the schools." (Brief, 24).
5. Since there has to be an accounting for the items, "surveillance" and "fiscal control" are required. (Brief, 24).
6. Since the nonpublic school is responsible for any expenditures in excess of its allocation, "surveillance, auditing and fiscal control" are required. (Brief, 24-25).
7. "The nonpublic schools are required to maintain an inventory of the textbooks." (Brief, 25).
8. The nonpublic school is required to inform the Department of Education that loaned textbooks become lost, missing, obsolete or worn out. (Brief, 25).
9. The public authority is given the right to look at the nonpublic school's file of certificates of requests for all textbooks loaned. (Brief, 25).
10. The instructional materials provision is "open-ended". (Brief, 25-26).
11. Instructional materials are loaned at the request of schools. (Brief, 26).
12. Instructional materials, unlike textbooks, can be used for religious purposes, including "recruitment campaigns for religious vocations and missionary work". (Brief, 27).

Appellants say that these various points when added up, spell out such a primary effect and entanglement as to violate the Constitution of the United States.

1. Intervenor-Appellees make no answer to the charge that "nothing in the Court's decisions before *Allen* . . . justified the conclusion reached in *Allen.*" (Brief, 23) beyond our view *supra,* that *Allen* is recognized by both sides to be a roadblock to nullification of Act 195.

2. The charge is made that "the Guidelines make no provision for individual requests to the Department of Education." To this statement is cited Section 4.3 of the Guidelines, and Appellants fail to apprise the Court that the following portion of Section 4.13 states:

> "4.13 The nonpublic school or the agency which it is a member shall be responsible for maintaining on file certificates of *requests from parents of children* for all textbook materials loaned to them under this act." (Emphasis supplied.)

Nor do they tell the Court that the Pennsylvania Guidelines adopt exactly the procedure upheld in *Allen:*

> ". . . both parties suggested in their briefs . . . that New York permits private schools to submit to boards of education summaries of the requests for textbooks filed by individual students, and also permits private schools to store on their premises the textbooks being loaned . . . For purposes of this case we consider the New York statute to permit these procedures. So construing the statute, we find it in conformity with the Constitution, for the books are furnished for the use of individual students and at their request." *Allen, supra,* at 244, fn. 6.

3. The charge that "the nonpublic school is granted a five percent transportation allowance" is simply false. Appellants cite Section 4.4 of the Guidelines. Here is how that reads:

> "Five per cent should be allowed in the purchase request for transportation allowances."

The nonpublic school is granted no "allowance". Section 4.4 simply notes that five per cent for delivery costs must be figured in (just as 4 per cent under Section 2.13, for administrative costs), in the determination of what may be spent for textbooks for children in a particular school.

4. The charge that the textbooks are "not *delivered* to the children but to the schools" is again both finical and inapposite. *Allen* recognized that the New York program there considered permitted private schools not only to submit summaries of requests, in bloc, to the State, but also "permits private schools to store on their premises the textbooks loaned . . ." *Allen, supra,* at 244, fn. 6. To have the books mailed (or hand-delivered) as separate parcels to each child in New York participating in the program, would have rendered the program an impossibility. It is ludicrous to suggest that such delivery procedure spells the difference between the Act's being within the Nation's constitution or without it.

5. The Appellants' charge that "surveillance" and "fiscal control" of the "operations of parochial schools" are needed with respect to the textbook loan program is false. The cited Section 4.7 of the Guidelines says nothing of the kind. It merely requires the *Department of Education* to keep *its own* records re *acquisition of textbooks.* Similar rules and regulations for the textbook loan program upheld in *Allen* were before the Court in that case. *Allen, supra,* at 239. And see Brief of Intervenor-Appellees in

Allen, October Term, 1967, No. 660, Supplement 3 (the New York regulations). Those regulations provided that the textbooks, following loan, must continue to be treated as the property of the school district. (*Ibid.*) That requirement clearly imposed a fiscal control (limited to the textbook loan program) and record-keeping.

6. The charge that Section 4.9 requires surveillance, auditing and fiscal control is likewise incorrect. That section does nothing more than provide that if the children in a school make requests in excess of the allowable cost of $12 per child, the school, not the state, is liable for the excess. This is determined from the face of the request and does not involve auditing, surveillance or fiscal control.

7. Appellants' charge that the nonpublic schools are "required to maintain an inventory of the textbooks" only further illustrates the paucity of their efforts to find something—anything—that, combined with like empty charges, will appear to be "cumulative" evidence of unconstitutionality. But no collection of straws will ever make a brick. The short answer is that of course the schools must maintain an inventory, and that fact, while it cuts the legs off the argument that there is no real loan here, creates no problem of entanglement (and indeed Appellants fail to describe whatever entanglement problem they have imagined the inventory creates).

8. So with Appellants' eighth charge: that the schools must inform the Department of Education of textbooks which are lost, worn out, etc. Appellants again do not spell out how this logical corollary to the inventory requirement creates a primary effect or entanglement problem: they are content simply to state their worry—and to let this Court figure out what the legal problem is.

9. Appellants' anxiety over the fact that the public authority is allowed to inspect the file of individual requests for books is not easy to understand in view of the fact that another anxiety of the Appellants (see their second objection above) is that there is really no "individual request" provision in the Guidelines. In any event, such inspection was impliedly sanctioned in *Allen*, since it is an indispensably necessary accompaniment of the accounting procedures therein recognized.

10. Nor will the Appellants' charge, that the instructional materials provision of Act 195 is "open-ended", stand scrutiny. The rule of *ejusdem generis* demands that the meaning of "such other secular [etc.] materials" is to be found in the listing of the educational materials preceding it. *Swartley v. Harris*, 351 Pa. 116 (1945). And see Pennsylvania Statutory Construction Act of 1972, 1 Pa. S. § 1903b. The Guidelines plainly reflect such a construction, and here again, Appellants shied away from any effort to prove that the practice is otherwise.

11. The charge that the instructional materials are loaned at the request of schools was met directly and completely disposed of by the District Court:

> "Nor can we attach constitutional significance to the fact that the schools rather than individual students, become the bailees of the materials. *No evidence* has been presented from which we may infer that secular, neutral, nonideological instructional materials such as audio-visual materials, intended for group rather than individual use, are any more susceptible of diversion to a religious purpose than are textbooks . . . The school is the custodian out of practical necessity because such materials are designed for group or multi-student use." (JS 45a. Emphasis supplied.)

12. Finally, Appellants indulge their alleged concern that "maps, charts and globes" can be used to recruit for "religious vocations and missionary work". So can a geography textbook. So can a school bus. The argument that such instructional materials are "not self-contained and self-explanatory" but are to be used in aid of "oral exposition" goes wide of the mark. The very examples selected—maps, charts and globes—prove the point. A map of Europe may, equally with a geography of Europe or a history of Europe, be read, absorbed and not orally exposed or discussed. And, on the other hand, textbooks are frequently used in all classrooms as starting points and bases for discussion. The court below, with obvious logic stated that ". . . there are no distinctions of constitutional significance" between secular, neutral, non-ideological textbooks and the secular, neutral, non-ideological instruction materials defined in Act 195.

V. The District Court Was Correct in Holding Constitutional the Loan of Secular, Neutral, Non-Ideological Equipment Under Act 195.

The briefly stated objections of Appellants to the instructional equipment loan program were considered by the District Court and specifically rejected. These are that the program helps finance "ordinary expenses" of operating a school, (Brief, 29), and that "much of the permissible equipment can be used for religious purposes." (Brief, 30).

Essentially, Appellants' argument, that the equipment loan provision helps finance "ordinary expenses", simply repeats the same charge which they make with respect to auxiliary services, textbooks, and instructional materials. As has been seen, and as the court below noted, under other provisions of the Public School Code instructional equipment has been furnished to pupils attending public school as part of what is deemed essential to education for functional adult citizenship (JS 7a). As the record establishes, nonpublic school children by and large had not been furnished the free use of such equipment by their schools (A78-A79). Moreover, there would seem to be no logical basis for creating a constitutional distinction between instructional textbooks and those items of instructional equipment which are allowed in the judgment of the District Court. Each is plainly helpful to the educational process. But while many a history text may open up value-related areas, a set of parallel bars, in the minds of practical men, does not. Ideologically, therefore, the allowed instructional equipment is at the core, rather than the periphery, of "secular, neutral, non-ideological" materials. Appellants say that "industrial arts equipment" can be used "to construct crosses, crucifixes and altars, and it is a fair *guess* that in many church schools they are used, *inter alia*, for exactly those purposes." (Brief, 30. Emphasis supplied). But why *guess*? Why not *proof*? It is an obvious gross libel upon these schools to insinuate that they would involve children in such nonsense. It is fantasy to suggest that parents would permit such a use of their children, or that schools "which have contributed so much in educating so many at relatively low cost" (JS 56a) would allow a diversion of their efforts into such preposterous activities.

The District Court held the loan of neutral instructional equipment under Act 195 to fail neither the primary effect or entanglement tests. Appellants, in their brief, say nothing to overset that determination, nor have they produced an iota of evidence to establish their contentions.

VI. The Acts Create No Political Entanglement.

Appellants, though charging that each of the Acts "gives rise to and intensifies political fragmentation and

division along religious lines" (Complaint, A8), avoided any effort to prove that grave contention. The contention not only accuses a state legislature of adopting socially disruptive legislation; by implication it stigmatizes state officials, parents, children and school administrators who work with or benefit by the programs. On the other hand, Appellees proffered a witness of expert qualifications who testified that the Acts would have none of the results claimed in the Complaint (A116-A122). Nothing in the record contradicts or counters that testimony.[11]

VII. The Determination of Constitutionality, Under the Establishment Clause, of the State's Choice of Means in Aiding Children Must Take Into Account Religious Liberty, Liberty of Personal Choice and State Interests in the Health and Education of Children.

Well did the court below say:

> "Thus in legislating upon the education of children the state's choice of means for the achievement of its educational objectives is not restricted only by the establishment clause, and a court considering a constitutional challenge to a state's program must be mindful that the balance struck may be one as to which the alternatives for the achievement of those objectives is limited." (JS 28a).

The District Court thus echoed what has many times been expressed by the Supreme Court in Establishment Clause

11. In upholding an Ohio statute providing certain types of auxiliary services and materials to children in nonpublic schools in *Wolman v. Essex, supra,* the District Court well stated: "We find it difficult to believe that a statute designed to help all students who are physically handicapped or who are emotionally or mentally disturbed or who have some other type of learning problem that requires the expertise of a professionally trained specialist to overcome could fractionalize the electorate along religious lines." Slip op. at 12-13.

cases. In *Walz v. Tax Commission,* 397 U. S. 664 (1970), this Court emphasized the necessity of balancing Free Exercise considerations against Establishment Clause claims:

> "The Establishment and Free Exercise Clauses . . . are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions of the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute.
>
> * * *
>
> "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." 397 U. S. 664, 668 (1970).

Appellants, however, insist that the Establishment Clause be treated as a simple and absolute rule which states the mind of the Constitutional fathers on Acts 194 and 195. That rule decrees that the decision of a parent in the America of the 1970s to enroll his child in a religious school must necessarily be fatal to important incidents of that child's citizenship. Public programs which all agree are good for all children must be denied *that* child, so the Fathers are said to have thought, although the compulsory attendance laws, universal education, the requirements of participating in a modern industrial society and its extensive taxation of the population were unknown to them. The inevitable effect of such a construction is plain: a child must be excluded from the enjoyment of the benefits of public welfare programs designed for children unless he enrolls in a public school.

As the District Court indicated, such a construction would cause a direct overriding by the Establishment Clause of other clauses of the Constitution protective of personal liberty [12] (JS 27a-28a). The liberty of choice in education recognized in *Pierce v. Society of Sisters,* 268 U. S. 510 (1925) must then become, for many children, in today's economy, a liberty in theory only. And as Appellees' Answer asserts, to deny a child the public welfare benefits of remedial, speech and other auxiliary services, or of loaned neutral instructional items, *solely on the ground that he fulfills the requirements of compulsory attendance in a school wherein he also fulfills a duty of religious conscience,* would appear to deny him the equal protection of the laws in an area of fundamental right. Further, such a construction carries the assumption that some judgments of states as to sound child welfare and educational policy must—irrespective of their intrinsic merit—be nullified. Such a construction finds no historical justification, nor is justification for it found in the decisions of this Court.

12. ". . . our duty is to interpret the two clauses [Establishment and Free Exercise] in a sensible and realistic fashion with a view to achieving whatever reconciliation is reasonably consistent with the purpose and intention of the Founding Fathers. Repeatedly the Supreme Court has recognized that the sweeping unqualified language of the Establishment Clause cannot be literally enforced but must be construed to accommodate *other fundamental rights.*" *Wilder v. Sugarman,* — F. Supp. — (D. C. S. D. N. Y., November 19, 1974) (Slip op. 22. Emphasis supplied).

CONCLUSION.

It is respectfully submitted that this Court should Affirm the judgment below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-1765

SYLVIA MEEK, *et al.*, *Appellants*

v.

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and

JOSE DIAZ, *et al.*, *Appellees*

and

JOHN P. CHESIK, *on his own behalf and on behalf of his daughter*, EMILY, *et al.*, *Appellees*

BRIEF OF APPELLEES CHESIK, *et al.*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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SYLVIA MEEK, *et al.*, *Appellants*

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JOHN P. CHESIK, *on his own behalf and on behalf of his daughter*, EMILY, *et al.*, *Appellees*

BRIEF OF APPELLEES CHESIK, et al.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ."

Acts 194 and 195 are set forth in the Appendix to the Jurisdiction Statement.

QUESTIONS PRESENTED

1. Do Acts 194 and 195, which extend to nonpublic school children certain secular, neutral and non-ideological educational benefits (remedial tutoring, textbooks, educational aids, etc.) which are presently available to public school children, violate the Establishment Clause?

2. Have plaintiffs met their burden of proving that the Acts, as applied, differ from their stated secular legislative purpose, i.e., to aid all children of the Commonwealth "to develop to the fullest their intellectual capacities"?

STATEMENT OF THE CASE

I. The Statutes Involved

Pennsylvania Acts 194 and 195 which became law on July 12, 1972, amended Pennsylvania Public School Code of 1949[1] to extend to nonpublic school children through pre-existing administrative units (called intermediate units) of the State Department of Education certain secular, neutral and non-ideological educational benefits which were already available to children in public schools.[2] Under

1. 24 P.S. §§1-101 to 27-2702.

2. The Legislative Findings & Declaration of Policy for Act 194 state:

"a) Legislative Finding; Declaration of Policy. The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth, auxiliary services free of charge to children attending public schools within the Commonwealth. Approximately one quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this Act, attend nonpublic schools. Although their parents are taxpayers of the Commonwealth, these children do not receive auxiliary services from the Commonwealth. *It is the intent of the General Assembly by this enactment to assure the providing of such auxiliary services in such a manner that every school child in the Commonwealth will equitably share in the benefits thereof.*" (Emphasis added) (Appendix to Jurisdictional Statement 108a-109a) (Henceforth references to the Jurisdictional Statement will be designated JS 1a, etc.)

Those for Act 195 state:

"a) Legislative Findings; Declaration of Policy. The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth, textbooks and instructional materials free of charge to children attending public schools within the Commonwealth. Approximately

these Acts, no payment is made directly to any school, and the benefits provided to nonpublic school children are the same as those for public school children.[3]

The specific benefits which these Acts extend to all school children within the Commonwealth of Pennsylvania are:

(1) *auxiliary services*—i.e., special tutoring in basic learning skills;[4]

(2) *loan of textbooks* "which are acceptable for use in any public, elementary or secondary school";[5]

(3) *loan of instructional materials*—i.e., "secular, neutral, non-ideological" materials "as are of benefit to the instruction of nonpublic school children and

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Note 2—*Continued*

one quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this act attend nonpublic schools. Although their parents are taxpayers of the Commonwealth, these children do not receive textbooks or instructional materials from the Commonwealth. *It is the intent of the General Assembly by this enactment to assure* such a distribution of such educational aids *that every school child in the Commonwealth will equitably share in the benefits thereof.*" (Emphasis added) (JS 112a-113a).

3. Under various provisions of the Code, the Commonwealth furnishes auxiliary services to pupils attending public schools. See 24 P.S. §§9-951-9-971. The Commonwealth also furnishes textbooks, instructional materials, and instructional equipment to pupils attending public schools. See *e.g.* 24 P.S. §§8-801, 8-807.1.

4. Act 194 defines auxiliary services as follows:

'Auxiliary services' means (1) *guidance*, (2) *counseling and testing services*; (3) *psychological services*; (4) *services for exceptional children*; (5) *remedial and therapeutic services*; (6) *speech and hearing services*; (7) *services for the improvement of the educationally disadvantaged* (such as, but not limited to, teaching English as a second language), and such other *secular, neutral, non-ideological services* as are of benefit to nonpublic school children and *are presently or hereafter provided for public school children* of the Commonwealth." (Numbers and emphasis added for clarity)

5. Act 195, §(b), JS 114a.

are presently or hereafter provided for public school children of the Commonwealth";[6] and

(4) *instructional equipment* which is "secular, neutral, non-ideological," not capable of diversion to sectarian uses, and "presently or hereafter provided for public school children of the Commonwealth."[7]

II. The Pleadings, the Record, and the Decision Below

A. *The Pleadings*

Plaintiffs' complaint attacks Acts 194 and 195 as unconstitutional on their face and as applied in violation of the Establishment and Free Exercise[8] Clauses of the First Amendment.

Plaintiffs filed motions for a temporary restraining order and a preliminary injunction. The application for a temporary restraining order was denied by a duly constituted three judge court.

B. *Trial on the Merits*

On September 10, 1973, the lower court heard testimony and received evidence on the merits concerning the operation, purpose and effect of the Acts.

Plaintiffs' only witness on the establishment issue was an employee of the Department of Education, who stated that the Commonwealth, in administering the Acts, does not inquire as to any religious characteristics of schools attended by students eligible for benefits under the Acts, because, by definition,[9] the only requirements of the Acts

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6. *Ibid.* JS 113a-114a.

7. *Ibid.* JS 113a.

8. Appellants have apparently abandoned their Free Exercise claim, and must be deemed to have abandoned their attack on the application of the Acts for lack of evidence.

9. Nonpublic school is defined in Acts 194 and 195 in their respective Sections 1(b), JS 109a and 114a.

are that schools meet the standards for fulfilling the state compulsory education requirements[10] and comply with the provisions of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

Plaintiffs then rested, asserting that the Acts were unconstitutional on their face and that no evidence of the application of the Acts was necessary. Plaintiffs were afforded the opportunity to supplement the testimony offered on September 10, 1973, but elected to rest on that record.

All of the defendants' witnesses established that the benefits provided by Acts 194 and 195 had not generally been available to nonpublic school children prior to the passage of the Acts, and that the programs, as administered by the Intermediate Units of the Department of Education and the auxiliary services, supplemented by auxiliary equipment, were of invaluable aid and assistance to children in need of such services as remedial reading, speech therapy, and other similar forms of non-ideological, non-religious instruction.

C. *The Decision Below*

The lower court unanimously affirmed the constitutionality of the textbook provision of Act 195, and also, with one Judge dissenting, the constitutionality of the auxiliary services provided by Act 194, and the instructional materials provisions of Act 195.

It also affirmed, with one Judge dissenting, the constitutionality of the provision under Act 195 of instructional equipment "which from its nature is incapable of diversion to a religious purpose" (JS46a), and at the same time, unanimously held unconstitutional those sections providing instructional equipment "capable of diversion to sectarian purposes." (JS46a)[11]

10. Testimony of Czekoski at Appendix p. 48. (Hereafter references to the separate Appendix filed with appellants' brief will be designated A1, etc.).

The majority opinion of the court below in this case correctly applied the precepts set forth in the Opinions of this Court concerning the Establishment Clause of the First Amendment, and the Judgment below should be affirmed.

D. *Appellants Chesik, et al.*

This brief is filed on behalf of Intervenors John P. Chesik, on his own behalf and on behalf of his daughter, Emily; Mrs. Robert Boozer, on her own behalf and on behalf of her daughter, Debra McKissick; and the Springside School, a non-sectarian independent girls' college preparatory school, on behalf of its students, whose fees and expenses are being paid by the Pennsylvania Association of Independent Schools, as the spokesman for all parents of children enrolled in independent[12] schools throughout the Commonwealth.

There are in Pennsylvania, as elsewhere in the country, a host of independent private schools, both sectarian and non-sectarian in addition to Catholic ones, that are encompassed by the term "nonpublic" schools. The sectarian schools are as varied as the wide range of our ethnic and religious heritage, including such religious groups as the Society of Friends (Quaker), Lutheran, Presbyterian, Episcopalian, Methodist, Jewish, and many others.

11. No appeal was taken from this aspect of the lower court's order and subsequent references in this brief to instructional equipment refer only to such equipment as is incapable of diversion to sectarian uses.

12. Independent schools make a unique and significant contribution to the American educational system. For further documentation, see Appendix B to Brief of Henry E. Crouter, filed in this court in *Sloan v. Lemon and Crouter v. Lemon*. (October Term, 1972, No. 72-620).

SUMMARY OF ARGUMENT

Acts 194 and 195 extend the same secular, neutral and non-ideological benefits to nonpublic school students through pre-existing administrative bodies that are presently available to public school students. No direct payments are made to any schools.

The court below correctly applied the constitutional criteria under the Establishment Clause of the First Amendment, as set forth in *Lemon v. Kurtzman*, 403 U.S. 612 (1971) and *PEARL v. Nyquist*, 413 U.S. 756 (1973), and its decision should be affirmed. The failure to exclude children attending sectarian schools from the benefits provided by the Acts does not make them unconstitutional.

Far from being an attempt to "evade or outwit" the Establishment Clause as appellants contend, Acts 194 and 195 clearly manifest a secular legislative purpose,—i.e. to improve the educational skills of children.

Plaintiffs below failed to offer any evidence that the primary or principle effect is other than its stated purpose of extending non-sectarian, non-ideological educational opportunities to all school children in Pennsylvania. As the lower court found, the Acts do not provide a special benefit to nonpublic school children which is not available to public school children; the benefits provided are neutral and non-ideological; and, if there is any benefit to religious institutions, it is not direct, but indirect and incidental.

Because of the secular nature of the benefits provided, the Acts do not present the potential for entanglement between the state and religious institutions as did legislation providing for direct payments to religious schools for the core of the educational program where the potential for sectarian influence is so great. Moreover, to provide auxiliary services off the premises of religious schools as appellants suggest would involve more, not less, entanglement.

For these reasons, appellants' arguments that the benefits provided by the Acts subsidize religious institu-

tions and require surveillance to insure secularity must be rejected because the Acts on their face are constitutional and appellants failed in the court below to offer competent evidence to support these charges.

Appellants suggest that this Court reexamine *Board of Education v. Allen*, 392 U.S. 236 (1968). We welcome such a re-examination, for we are certain that *Allen* was based upon sound constitutional principles—and we are equally convinced that the failure to exclude children attending religious schools from the benefits afforded under Acts 194 and 195 violates neither the letter nor the spirit of the Establishment Clause of the First Amendment and is permitted under numerous decisions of this Court.

ARGUMENT

I. Introduction

A. The Importance of Education.

America has had a love affair with education. And rightly so, because from our earliest times, we have recognized that an educated people are free,—and that only through education can we build an informed, enlightened community of people, capable of sharing and distributing power, resources and wealth whereby each can contribute towards the betterment of self and nation.

Henry Peter, Lord Broughman, English statesman, jurist and scientist (1778-1868), has stated the case for education succinctly and well:

> "Education makes a people easy to lead but difficult to drive; easy to govern but impossible to enslave." —"*Familiar Quotations*", John Bartlett, 14th Edn., 1968—p. 540.

Mindful of the extraordinary commitment and dedication of our people to the critical importance of education in American life, we find it incredible that the motives of those in Pennsylvania (and countless other States), who seek a constitutionally valid way to strengthen our nation's commitment to pluralism in education in general, and in particular to improve the educational skills of all children —regardless of race, color or creed—should be impugned, as they have been by the opening pages of appellants' brief, by thinly-veiled charges of deviousness and legislative bad faith.

Furthermore, we reject totally appellants' implied claim that they are the *only* protectors of religious liberty and freedom[13]—and that those including elected representatives in government who support the use of public funds for nonpublic education are the destroyers.

Let the record be clear that we yield to no one in our

13. Mrs. Meek, one of the plaintiffs in this action, testified that she did not practice any religion. (A37)

total commitment to uphold the Establishment and Free Exercise Clauses of the First Amendment. But in so doing, we recognize, as this Court has on many occasions, that there is not and cannot be an absolute wall of separation between church and state in matters affecting such important values as education.

As developed below, the role of the First Amendment in its admonition to government in these critical areas is not, as appellants contend, that of "friend or foe", but rather one of neutrality,[14] to insure that the state does not become involved in opposing or supporting an established church or in the discouraging or advancing of religion.

There is no greater duty and responsibility on a democratically constituted government than to insure the development of the educational skills in its young people. As stated by this Court in *Board of Education v. Allen*, 392 U.S. 236 at 247 (1968):

> "Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation and the kind of citizenry, that they have desired to create."

And as noted in *Everson v. Board of Education*, 330 U.S. 1 (1947):

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." 330 U.S. at 7.

We respectfully ask this Court to rule that plaintiffs have failed utterly to meet the heavy burden thrust on anyone who would ask this Court to invalidate state action; and that the declared purpose and proved effect of the instant legislation is to advance education, not religion,

14. *Committee for Public Education (PEARL) v. Nyquist*, 413 U.S. 756 at 793 (1973); *Walz v. Tax Commission*, 397 U.S. 664 at 669 (1970).

by extending to children attending nonpublic schools the same nonsectarian, nonideological, self-policing educational opportunities in the form of remedial help, textbooks, and educational equipment as are currently available to children in the state public schools.

B. The Acts Are Constitutional.

Acts 194 and 195 extend certain benefits to nonpublic school children within the Commonwealth of Pennsylvania; these benefits are identical to those previously provided to public school children throughout the Commonwealth. Furthermore, the benefits are provided by the same administrative units and personnel which provide them for the public school system, that is, the intermediate units.

As discussed below, these Acts meet the requirements of recent decisions of this Court and avoid the pitfalls of legislation previously invalidated.

The appellants purport to attack the Acts on their face, and seek to reverse the court below on the grounds that:

- ¶ the benefits provide a subsidy to religious schools;
- ¶ the state must provide continued surveillance to insure secularity.

But appellants have failed totally, after a full evidentiary hearing on the merits, to establish any facts in support of their charges that the purpose or effect of these Acts is to advance religion.

Appellants have the burden, which is a heavy one,[15] to establish evidence of unconstitutionality. They have not met this burden. They offered no evidence to show that the Acts in operation differed from their stated legislative purpose. They offered no evidence that the purpose or effect was to advance religion.

Moreover, their argument is replete with certain factual assumptions, none of which are supported by the record in this case.

15. *Lenhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1972) *reh denied*, 411 U.S. 910.

C. Failure to Exclude Children Attending Religious Schools from the Benefits of the Acts Does Not Violate the Establishment Clause.

Stripped of all rhetoric, appellants' basic attack rests on the erroneous premise that the Acts are constitutionally deficient because there is no restriction to prohibit extending these benefits to children attending religious schools.

Appellants cite no authority for such an unwarranted position—and understandably, since this Court in *Everson* and *Allen* ruled just to the contrary. As noted in *Everson*:

> "[The state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. (emphasis in original). While we do not mean to intimate that a state could not provide transportation only to children attending public schools, *we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious beliefs.*" (emphasis added) 330 U.S. at 16.

In this case, the Pennsylvania legislature has extended general state law benefits to all citizens without regard to their religious beliefs[16] and in so doing, the legislation provided is clearly constitutional.

16. As noted below in Section II B(2) there is not a scintilla of evidence to support the contention that any of the schools attended by children eligible for the benefits of Acts 194 and 195 have any of the religious criteria or profile to which appellants refer in their brief at pages 4, 17-18.

Furthermore, as discussed in Section IV B below, any effort on the part of the state to make such inquiry would be violative of the free exercise rights of the parents and their children.

As noted in *Allen*, 392 U.S. at 247, underlying the cases is the recognition by this Court that private education, including sectarian schools, performs the function of providing secular education to a substantial body of the state's school-age children. The Pennsylvania legislature has, through Acts 194 and 195, attempted to extend to all students certain benefits or tools so that they can more readily learn the secular subjects and communication skills in which the state has such an interest as to justify compulsory education.

Recent decisions of this Court have reaffirmed that while a state *has the power* to extend its general state law benefits to all of its citizens without regard to their religious beliefs, it is *not required* to do so. *Luetkemeyer v. Kaufmann*, — U.S. — (No. 73-1612, decided October 21, 1974) and *Brusca v. State Board of Education*, 405 U.S. 1050 (1972), *aff'g*, 332 F. Supp. 275 (E.D. Mo. 1971). We are not here arguing that the state is constitutionally required to extend these benefits. In this case they have elected to do so. Based on the authorities discussed above, this is clearly within the state's prerogative and appellants' efforts to block it should be rejected.

Furthermore, as developed in section IV, C below, inquiry into the religious practices, if any, of schools attended by children eligible for benefits under Acts 194 and 195, would violate their constitutional rights.

II. The Lower Court Correctly Applied the Precepts of this Court.

The majority opinion of the court below correctly applied the decisions of this Court concerning the Establishment Clause of the First Amendment.[17]

17. The lower court applied the criteria set forth by Mr. Chief Justice Burger in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

"First, the statute must have a secular legislative purpose;

A. *Primary Purpose*

It is clear, as the court below found that the legislative recitals set forth in footnote 2 above indicate a proper secular purpose.[18]

Appellants insist, however, that the legislative motivation behind the Acts is to "evade or outwit" the Establishment Clause and attempt to support this argument by pointing to previous Pennsylvania legislation held unconstitutional by this Court, *Lemon v. Kurtzman* (purchase of services) and *Sloan v. Lemon* (parent reimbursement for tuition). (See Appellants' brief, p. 10).

However, this Court held that the legislation in both *Lemon v. Kurtzman* and *Sloan v. Lemon* had the requisite secular legislative purpose,[19] and certainly the stated legislative purpose of Acts 194 and 195 is equally secular.[20]

If appellants now contend that the effect of the Acts is other than their stated purpose, they have failed to offer any evidence to support such a contention.

B. *Primary Effect. The Pennsylvania Acts Meet the Criteria of PEARL v. Nyquist and Sloan v. Lemon.*

After analyzing the various opinions in this Court con-

Second, its principal or primary effect must be one that neither advances nor inhibits religion; *Board of Education v. Allen*, 392 U.S. 236, 243 (1968);

Finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-613. (paragraphs supplied for clarity)

18. The legislative declarations of purpose of Acts 194 and 195 are compeltely different from those in *Lemon v. Kurtzman*, *supra*, *PEARL v. Nyquist*, 413 U.S. 756 (1973), and *Sloan v. Lemon*, 413 U.S. 825 (1973) where the legislative purpose was to preserve pluralism in response to the crisis in nonpublic schools created by rapidly rising costs.

19. *Lemon v. Kurtzman*, *supra*, 402 U.S. at 613; *Sloan v. Lemon*, 413 U.S. 825 at 829-830 (1973).

20. The legislative purpose of the Acts is almost identical to those in *Everson*, *supra*, and *Board of Education v. Allen*, 392 U.S. 236 (1968).

cerning primary effect (JS 17a *et seq.*)[21] the court below held that the provisions of the Acts here on appeal did not have the primary effect of advancing religion.

The decision below should be affirmed because the evidence establishes that:

¶ The primary purpose and effect of the Acts is to aid and improve the educational skills of children.

¶ The Acts are not the kind of "class legislation" and special benefit condemned by the majority in *PEARL v. Nyquist, supra,* 413 U.S. at 794 and related cases. The full record establishes that the purpose and effect of Acts 194 and 195 is to extend to children attending nonpublic schools, some of the same secular educational benefits currently given to children attending public schools.

¶ The textbooks, educational services and related equipment are for the direct and sole benefit of the children—and no funds are given to any religious order or institution.

This Court, in its opinion in *PEARL v. Nyquist* and *Sloan v. Lemon*, analyzed in depth the limits of permissible state aid for education which does not have the primary effect of advancement of religion. It laid down a four-fold test which, among other things, totally rejects the subsidy argument advanced by appellants.[22]

To pass constitutional muster under the foregoing cases, the projected state aid

¶ must not be class legislation; and must be

21. *PEARL v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education & Religious Liberty (PEARL)*, 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Hunt v. McNair*, 413 U.S. 472 (1973).

22. See Mr. Justice Powell's opinion for the Court in *Hunt v. McNair* quoted below at page 24.

¶ indirect,
¶ incidental, and
¶ neutral, non-ideological.[23]

Acts 194 and 195 clearly meet all these tests.

(1) *This Is Not Class Legislation*

The constitutional infirmity that the majority found in *Sloan v. Lemon* was that a special benefit—i.e., tuition reimbursement, which carried with it absolute freedom of choice of school—was conferred on parents of nonpublic school children which was *not* available to parents of public school children. And since it appeared that a majority of the children and families benefited were those attending church related schools, the legislation was struck down as being class legislation having the impermissable effect of advancing religion. The present legislation is fundamentally different and has no such infirmity. Here the Acts merely extend to children attending nonpublic schools, some of the benefits which are presently available to children attending public schools.[24]

23. As stated by Mr. Justice Powell in *PEARL v. Nyquist, supra*, 413 U.S. at 775.

> "These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one, as the above cases illustrate. Of course, it is true in each case that the provision of such neutral, non-ideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other non-secular areas. *But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.*" (emphasis supplied).

24. Mr. Justice Powell has stated this court's concern that no *special* aid be given to those who support nonpublic schools:

Moreover, the Acts themselves define the benefits in terms of those available to public school students. Thus, by definition no special benefit is made available to one class, nonpublic students, which is not generally available to public school students.

(2) *The Benefits, if Any, to Religiously Affiliated Institutions Are Indirect.*

Acts 194 and 195 provide no direct payments to any schools in Pennsylvania. There is, therefore, no possibility of any direct financing of religion or religious education. These Acts are therefore distinguishable from those cases where payments were made directly to nonpublic schools[25] and come within the long, unbroken line of cases stating that legislation which provides only an indirect or incidental benefit to religious institutions is not unconstitutional.[26]

But appellants ignore the constitutionally significant difference between direct and indirect benefits to religious institutions. They insist that the Acts provide tax funds for

Note 24 -*Continued*

"We think it plain that this [i.e. tuition reimbursement to parents] is quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. (emphasis in original) *Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools.* (emphasis added)." *Sloan v. Lemon, supra* at 832.

25. 1) *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (purchase of secular educational instruction in traditional subjects) involved *direct* grants to schools which the court held required extensive surveillance to insure non-sectarian teaching.

2) *PEARL v. Nyquist*, 413 U.S. 756 (1973) likewise involved direct money for grants for maintenance and repair of buildings, with no way to separate between religious and non-religious use.

3) *Levitt v. PEARL*, 413 U.S. 472, provided direct grants to nonpublic schools for testing and teacher prepared tests, but the grants were unrelated to actual cost.

26. *PEARL v. Nyquist*, 413 U.S. 756, 775 (1973); *Sloan v. Lemon*, 413 U.S. 825, 832 (1973); *Hunt v. McNair*, 413 U.S. 734, 742-743 (1973); *Norwood v. Harrison*, 413 U.S. 455, 468 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970); *Board of Education v. Allen*, 392 U.S. 236, 244 (1968); *Everson v. Board of Education*, 330 U.S. 1, 17 (1946) and see *McGowan v. Maryland*, 366 U.S. 420, 442-443 (1961); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Bradford v. Roberts*, 175 U.S. 291 (1899).

the support of religious schools (appellants' brief, pp. 4, 10 and see pp. 8, 14 et seq.), including schools having the characteristics described in paragraph 8[27] of their complaint.

There is absolutely no factual basis for appellants' assertion (See appellants' brief, p. 4) that appellees concede that schools with those stated characteristics are eligible for benefits under the Acts.

At trial, counsel for plaintiffs attempted and failed to get such evidence in the record. (See A42-A43). Appellants admit that there is no basis in the record for the assertion that any Pennsylvania school has such characteristics when they admit that these characteristics were culled from references in various opinions of this Court concerning legislation which provided for direct payment of funds to nonpublic schools, *e.g., Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*.[28]

27. The allegations of paragraph 8 were denied. (See Answer of Pittinger A27, Answer of Diaz A30).

28. In *Tilton, supra*, appellants argued that the legislation there under consideration (direct grants for construction of secular buildings) was invalid in that it provided aid to institutions having the same characteristics as are alleged in paragraph 8 of the complaint in this action. This court noted that there was no evidence in the record that any of the institutions there under attack had such characteristics, and stated

"We cannot, however, strike down an Act of Congress on the basis of a hypothetical 'profile.'" 403 U.S. at 682.

Similarly, here, this Court should refuse to strike down Acts 194 and 195 on the basis of the same hypothetical profile, particularly since here, as in *Tilton*, the asserted characteristics have no factual basis from the record in this case.

What the record does show is that there are no disqualifying criteria in the Acts that would preclude children attending religiously-oriented schools from qualifying for benefits; and that the state does not inquire into whether the children attend religiously affiliated schools, but only into whether each school fulfills the compulsory education requirements.[29] (See A42, A46).

In any event, the religious characteristics alleged in paragraph 8 of plaintiffs' complaint are not relevant in the situation here, where no direct payments are made to any school; and the benefits, if any, to a nonpublic school are indirect and incidental. (See also Section I C above).

(3) *The Benefits Are Incidental.*

It is clear that benefits afforded by Acts 194 and 195 are incidental in that they do not relate to the principal content of the general educational program, but rather provide the tools—in form of textbooks,[30] instructional materials, etc. and special remedial help (hearing and speech therapy, etc.) to improve the childrens' basic communication skills from which the content can be acquired.[31]

29. The state has the duty to ascertain that all nonpublic schools meet certain requirements so as to qualify to fulfill the state requirements of compulsory education of all children in the Commonwealth. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Furthermore, as discussed below in Section IV B, any further inquiry into religious practices would violate the parents' and their children's constitutional rights.

30. Textbooks of course do relate to the core of educational content, but they are still only the tools of the educator. They are "incidental" in both *cost* and *educational importance* compared to the role of the classroom teacher.

Furthermore, textbooks are self policing in insuring secular content since the only textbooks that qualify under the Act are those which are "acceptable for use in any public . . . school".

Finally, textbooks have been held clearly valid under *Allen*, and see *Norwood v. Harrison*, *supra*.

31. As noted by Judge Gibbons in the opinion below (JS 36a), there is always a possibility that any program that improves communication skills in children might have some indirect effect on religion (i.e. that a child with glasses will be enabled to read the Bible), but such an incidental benefit does not constitute impermissible advancement of religion.

(4) *The Benefits Afforded by Acts 194 and 195 Are Neutral and Non-ideological.*

All of the benefits provided under Acts 194 and 195 are by definition (See Section C below) secular, neutral and non-ideological, and thus by their very nature, the benefits are self-policing and do not require surveillance to insure secularity.

C. *The Acts Do Not Foster Undue Entanglement.*

1. *Acts 194 and 195 Are Self-policing and Surveillance Is Not Required.*

As noted in sections (3) and (4) above, appellants complain, but without supporting evidence, that comprehensive and continuing surveillance is necessary to insure neutrality. (appellants' brief, pp. 19, 25, 27). This is just not so.

By definition, all the benefits provided under the Acts are neutral, secular and non-ideological,[32] and self-policing.[33] Plaintiffs below offered no evidence to the contrary, nor could they. Moreover, the Acts define the benefits in terms of those available to public school students,[34] and the Acts are administered by the same people

32. The definition of auxiliary services in Act 194 (see footnote 4 above) limits the benefits to "secular, neutral, non-ideological services." Act 195 defines instructional equipment as "educational, secular, neutral, non-ideological equipment," which is not susceptible to diversion to sectarian uses. Instructional materials include only "secular, neutral, non-ideological materials."

33. As noted in *Lemon v. Kurtzman*, 403 U.S. at 617:

> "In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not."

34. Auxiliary services are by definition only services which "are presently or hereafter provided for public school children of the Commonwealth." Instructional equipment and machinery are likewise limited by definition to items which "are presently or

who provide the same services, materials and equipment to the public schools.

Furthermore, there is no evidence that the administrative contact between the state and nonpublic schools is any greater than prior to the passage of the Acts when there already were requirements relating to the state's compulsory education requirements, health and safety regulations, etc.[35]

This Court has acknowledged—contrary to appellants' assertion (e.g., appellants' brief, p. 30)—that the Constitution does not and cannot require absolute separation between church and state. Some contact is inevitable. Thus, only "excessive" or undue entanglement is prohibited by the First Amendment.

As noted by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 at 614:

> "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952); *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan J., dissenting). *Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts.* Indeed, under the statutory exemption before us in *Walz*, the state

Note 34—*Continued*

hereafter provided for public school children of the Commonwealth." Textbooks are limited to "textbooks which are acceptable for use in any public, elementary or secondary school of the Commonwealth."

35. *E.g.*, 24 P.S. §13-1327, 24 P.S. §§14-401 to 14-122; Law of March 10, 1949, P.L. 30, Art. XII, Section 1303 (repealed 1972) (Smallpox vaccination). These Acts, unlike the one in *Marburger, supra*, do not require or permit the local school board "to inquire into the religious procedures and curricula of the nonpublic school" 358 F. Supp. at 40, and, therefore, they do not pose the potential for administrative entanglement present in *Marburger*.

> had a continuing burden to ascertain that the exempt property was in fact being used for religious worship. *Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship.*" (emphasis supplied).

Finally, mere administrative entanglement is not sufficient to invalidate otherwise permissible legislation. *Hunt v. McNair, supra, Cf. Wheeler v. Barrera, supra.*

2. *There Is No Legislative Divisiveness.*

Since the Acts are for the benefit of all the children of the Commonwealth, the potential for political divisiveness on religious grounds referred to in *Lemon v. Kurtzman, supra*, and *PEARL v. Nyquist, supra*, is not present in this case.

III. Rebuttal of Appellants' Contentions—These Acts Do Not Subsidize Religion or Require Undue Entanglement.

A. *Act 194—Auxiliary Services*

Appellants argue that the auxiliary services provided under Act 194 constitute a subsidy and result in undue entanglement (appellants' brief, pp. 14-20).

(1) *Auxiliary Services Provide No Direct Subsidy to Sectarian Schools.*

The central thrust of appellants' subsidy argument is that the provision of auxiliary services subsidizes nonpublic schools including sectarian schools, for expenses which would normally be paid out of the school's operating budget.

As a legal proposition, a majority of this Court in *Hunt v. McNair*, has rejected the argument that substitution of funds may constitute a subsidy of religion. See Mr. Justice Powell's opinion for the Court at page 743:

> "Stated another way, the Court has not accepted the recurrent argument that aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."

Neither the record nor a common sense view of the benefits provided support such contention. Here, as in *Allen*,[36] the benefits provided under Act 194 are to children and not to their schools. As noted in the opinion of the court below

> "We hold that none of the specific auxiliary services listed in Act 194 has the primary effect of aiding religion. Each has the primary effect of meeting the state's primary objective of assuring that individual students receive those individualized services, outside the general program of instruction of their school, necessary for their individual progress in learning. It is true, of course, that a child with vision defects, provided glasses, will be enabled to read the Bible, as a child with hearing defects, provided a hearing aid, will be enabled to hear the word of God, and as an emotionally disturbed child, given psychological or medical therapy, may become receptive to religious training. But the benefit to religion in such instances is clearly secondary, and such secondary benefit exists no less for children attending public than for children attending nonpublic schools." (JS 36a).

36. As Mr. Justice White noted,

"The express purpose of §701 was stated by the New York legislature to be a furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. *The law merely makes available to all children the benefits of a general program to lend school books free of charge*. Books are furnished at the request of the pupil and ownership remains, at least technically, in the state. Thus, no funds or books are furnished to parochial schools, and *the financial benefit is to the parents and children, not to schools*. (footnote omitted)." (emphasis added)

392 U.S. at 243-44.

Plaintiffs insist here, as they did in the court below, that Act 194 "subsidizes the teaching of secular subjects in church schools" (appellants' brief, p. 16), but the Act itself and the Opinion of the court below both make clear that the Act does not subsidize the general instructional programs of nonpublic schools (See Opinion JS 36a-37a).

(2) *Act 194 Does Not Require Undue Entanglement*

Appellants' second contention as to Act 194 is that it requires surveillance since auxiliary services may be provided within the confines and environment of a religious institution. (appellants' brief, p. 19).

As noted above, the remedial specialists do not teach in the general instructional program. At the time of the hearing, the program had been in operation for over a year. Yet plaintiffs produced not a shred of evidence of any entanglement, let alone the kind of "excessive entanglement" as is their burden. Appellants cannot rely now on mere suppositions to hold this Act unconstitutional, but must produce concrete evidence of "excessive" entanglement which runs afoul of the First Amendment. See *Hunt v. McNair, supra*.

Appellants argue that this program suffers the same infirmities as the purchase of secular educational service struck down in *Lemon v. Kurtzman* and the salary supplement held unconstitutional in *DiCenso*. (appellants' brief, p. 20). This is absurd—for the furnishing of auxiliary services under Act 194 bears no resemblance whatsoever to those programs.

- ¶ Under Act 194 no funds are paid to the schools.
- ¶ The services furnished—such as remedial tutoring in hearing, speech and reading, etc., are not part of the central core of the educational program—but are peripheral aids to raise the level of comprehension and expression of the slow learners.
- ¶ Those teachers who perform these services are state employees, paid by the state, and subject to its supervision and control.
- ¶ The services are secular, non-ideological, and self-policing to insure no religious intrusion.

We submit, as the court below found (JS 38a-39a), that psychological testing, speech and hearing therapy and other auxiliary services provided under Act 194 do not have any potential for the kind of religious infiltration or indoctrination, which caused the demise of purchase of educational services in *Lemon v. Kurtzman*.

B. *Act 195—Textbooks*

Appellants argue that the textbook provision of Act 195 should be held unconstitutional, either because *Allen* was decided incorrectly, or because the textbook provision of Act 195 goes beyond the "verge" in *Allen*. As discussed more fully below in Section IV, *Allen* was appropriately and correctly decided.

All appellants' contentions (appellants' brief, pp. 24-25) concerning textbooks relate to the Act *as applied*, and not on its face, and in each instance appellants have failed totally to show that the Act as applied is contrary to its stated purpose.[37] First, far from going substantially beyond *Allen* and the New York statute which it upheld, (appellants' brief, p. 23) the textbook provision of Act 195 operates in a substantially identical manner.[38]

As to surveillance, which appellants assert is required

37. See footnote 30 above.

38. See *Allen*, 392 U.S. at 244, n.6.

(See pp. 24-25), this surveillance is no more than that present in *Allen* or required under Title II of the Elementary and Secondary Education Act, and constitutes a one-time endeavor to ascertain the non-sectarian contents of any requested textbook.

C. *Act 195—Instructional Materials*

Much of the appellants' argument against the instructional materials provided in Act 195 has already been discussed in the sections above concerning textbooks and auxiliary services. Initially we note that the purpose of the Act is not to advance religion, but to make available benefits to nonpublic school children that are presently available for public school children. As the court below found, there is no constitutional significance to the fact that the schools rather than the individual students become the bailees of the materials (JS 45a). There is no evidence of any subsidy and in fact the evidence is to the contrary.

We are shocked that appellants, who declined the opportunity to offer any evidence of unconstitutionality "as applied," would now try to argue from the record in *Earley v. DiCenso* that teachers in sectarian schools are advised to stimulate interest in religious vocations and missionary work. Appellants argue at page 27 of their brief that teachers in religious schools *might* use instructional materials, such as maps and globes, for religious recruiting purposes. (See appellants' brief, p. 27). Putting aside such imaginative and unfounded charges of bad faith, the reference to *DiCenso* has no relevance in this case. In *DiCenso*, the state was unrestrictedly subsidizing parochial school teachers. Here, the State has offered certain neutral, secular, non-ideological instructional materials,[39] under a

39. Act 195 defines instructional materials to include only "secular, neutral, non-ideological books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, process slides, transparencies, films, filmstrips, kinescopes, and video tapes. (A. 19-20).

program that operates substantially the same as that established for textbooks.

D. *Act 195—Instructional Equipment*

Again, appellants' assertion that the purpose of Act 195 is to help finance the ordinary and everyday expenses of maintaining and operating church schools (appellants' brief, p. 29) is not supported by the stated purpose of the Act, the finding of the court below, or the record in this case.

As to primary effect, appellants claim to be now "certain" (appellants' brief, p. 30) that some of the instructional equipment, such as storage cabinets and carts, is used "to store and move religious materials." But they offered no evidence to support these preposterous charges. Furthermore, as Judge Gibbons aptly noted in the opinion of the court below,

> "Giving free rein to the imagination one could, perhaps, visualize a religious teacher storing holy water in a chemistry laboratory beaker, but as stated in *Tilton v. Richardson, supra*, 403 U.S. at 679:
>
> > 'A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. But judicial concern about these possibilities cannot, standing alone warrant striking down a statute as unconstitutional.' " (JS 46a)

In *PEARL v. Nyquist*, this Court invalidated *direct* grants to secondary schools for maintenance and repair, where no attempt was made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes. Thus, it was possible for a school to pay from state funds for maintenance of the school chapel or renovating classrooms in which religion was taught or the cost of heating and lighting those same facilities. The absence of appropriate restrictions rendered the programs unconstitutional.

Here there is (1) no direct grant to any school, (2) only a very limited category of instructional equipment, i.e. that which is not readily divertible to sectarian use, and (3) in the overall educational scheme, certainly a very incidental and indirect benefit to the school.

IV. Acts 194 and 195 Comport with Sound Constitutional Policy.

As discussed in Section I C above, the failure to exclude children who attend religious schools from the benefits of Acts 194 and 195 does not render those Acts unconstitutional.

A. *This Court Has Recognized and Encouraged the States to Experiment with State Action that May Indirectly Benefit Religious Institutions Without Advancing Religion.*

We are appalled that appellants in their brief at pp. 10 and 30 would criticize and challenge the good faith of those who seek innovative measures[40] to improve the educational skills of children attending nonpublic schools that include religiously sponsored schools.

As noted by Mr. Chief Justice Burger in *Walz v. Tax Commission, supra*, there is "room for play in the joints"—and only by experience, and trial and error, can the proper balance be found:

> "The course of constitutional neutrality in this area [the Establishment and Free Exercise Clauses of the First Amendment] cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded and none inhibited.
>
> "The general principle deducible from the First

40. For a ringing statement on the importance of experimentation, see Mr. Justice Brandeis' dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental inference with a religion.

"Short of those expressly prescribed governmental acts *there is room for play in the joints productive of a benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference." (emphasis added) 397 U.S. at 669.

Furthermore, this Court has stressed the importance which we as a nation place on religious values[41] and has taken great pains to distinguish between programs that advance religion contrary to the First Amendment, and acts that may indirectly benefit religious institutions as permitted by the First Amendment.[42]

The test, as stressed by Mr. Chief Justice Burger in the Court's Opinion in *Tilton*, is not whether there is an *incidental benefit* to religion—but whether the *primary effect* of state action is to *advance religion*. See *Tilton*, *supra*, at 679. This test acknowledges that sectarian schools perform a secular as well as religious function.

This position has been reaffirmed by this Court's recent decision in *Hunt v. McNair*, 413 U.S. 734 at 742-43 (1973) where Mr. Justice Powell stated for the Court:

41. "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952).

42. In so doing the following have been upheld:

¶ the right of Catholic schools to fulfill compulsory educational requirements, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925);

"To identify 'primary effect,' we narrow our focus from the statute as a whole to the only transaction presently before us.

Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. *E.g.*, Bradfield v. Roberts, 175 U.S. 291 (1899); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Tilton v. Richardson, 403 U.S. 672 (1971).

Stated another way, the Court has not accepted the recurrent argument that aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."

And as the Chief Justice noted for seven members of the Court in *Norwood v. Harrison*, 413 U.S. 455 (1973) (holding unconstitutional a Mississippi statute insofar as it permitted the State to provide free textbooks to private schools which pursued racially discriminatory policies)

¶ transportation reimbursement payments to parents, *Everson v. Board of Education*, 330 U.S. 1 (1947);

¶ released time for religious instruction from public school, *Zorach v. Clauson*, 343 U.S. 306 (1952);

¶ textbook loans to nonpublic school children, *Board of Education v. Allen*, 392 U.S. 236 (1968);

¶ construction grants to sectarian institutions of higher learning, *Tilton v. Richardson*, 403 U.S. 672.

¶ revenue bonds for construction at sectarian schools, *Hunt v. McNair*, 413 U.S. 472 (1973).

In the non-educational area, there are many decisions affirming the constitutional propriety of state action that clearly benefits religious institutions without advancing religion:

¶ Grants to religious orders for hospitals, *Bradfield v. Roberts*, 175 U.S. 291 (1899);

¶ Sunday closing laws, *McGowan v. Maryland*, 366 U.S. 420 (1961);

¶ Tax exemption from property taxes, *Walz v. Tax Commission*, 397 U.S. 664 (1970).

the religious and secular functions of church schools can be separated:

> "Neither *Allen* nor *Everson* is dispositive of the issue before us in this case. Religious schools 'pursue two goals, religious instruction and secular education.' Board of Education v. Allen, *supra*, 392 U.S., at 245, 8Ł S. Ct. at 1927. *And, where carefully limited so as to avoid the prohibitions of the 'effect' and 'entanglement' tests, States may assist church-related schools in performing their secular functions, Committee for Public Education v. Nyquist*, pp. 774, 775; *Levitt v. Committee for Public Education*, post, at 481, not only because the States have a substantial interest in the quality of education being provided by private schools, see *Cochran v. Louisiana State Board of Education*, 281 U.S. 370, 375 (1930), but more importantly because *assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others*." 413 U.S. at 468. (emphasis added).

B. *The Allen Case Was Properly Decided and the Rationale Should Be Expanded, Not Contracted.*

Contrary to the appellants' assertion (appellants' brief, pp. 21-23), *Allen* comes well within the established guidelines discussed in the preceding sections of this brief.

Furthermore, we also take exception to appellants' statement that the generation of our founding fathers that wrote the Establishment Clause intended to bar the type of secular educational benefits involved in the instant litigation. Nothing could be further from the truth.

In the first place, it hardly need be pointed out that we

have experienced far reaching social and economic changes in this country since 1787.[43]

And if, as appellants suggest, it is time to revisit the Establishment and Free Exercise Clauses, may we respectfully suggest that the time has come to recognize and frankly admit that the real purpose of the religious clauses of the First Amendment was to insure that we would never in this country have an established Church, either of Rome or England; and that government should keep hands off of how we choose to practice or not practice our religion.[44]

To try to read into this classic document of great simplicity—our U.S. Constitution—prohibitions that would today bar the states from using public funds to upgrade the secular educational skills of all children, including those who may attend religiously oriented schools, is pure sophistry. It does great injustice to the wisdom and common sense of these great men—who had sense enough to know, as this Court has often repeated, that the Constitution is a living document—to be construed and interpreted, with common sense and reason, in the light of changing conditions and situations. As has been so well

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43. For example, the concept of free public education as we know it today was unheard of when the First Amendment was adopted. Thus the first public school with tax-supported funds was not even established in Philadelphia until 1802, and then only on a very limited basis and with great misgivings from the conservative elements. *History of Philadelphia*, Volume III, Scharf & Westcott, at p. 1924. The first public school district and school board for any extensive public school system was not established in Philadelphia until April 6, 1818.

44. As stated in *Everson*, "The 'establishment of religion' clause of the First Amendment means at least this:

> "Neither a state nor the Federal Government can set up a church.
>
> "Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.
>
> "Neither can force or influence a person to go to or to remain away from church against his will or to force him to profess a belief or disbelief in any religion." 330 U.S. at 15.

stated and summarized by Mr. Chief Justice Hughes in *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 at 442-443:

> "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is a *constitution* we are expounding' (*McCulloch v. Maryland*, 4 Wheat. 316, 407)—'a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.' *Id.*, p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri v. Holland*, 252 U.S. 416, 433, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'"

We are far beyond the dangers of an established church or government controlled religion today. Any "support" to religious institutions which may be indirectly or incidentally supplied through the present legislation does not come within the First Amendment Prohibition.

The Establishment Clause was never intended to be, and is not now, either a "friend or foe" to any American; rather, it is a beacon light of neutrality which assures to each individual that the state will neither assist him nor

impede him in his religious beliefs. Acts 194 and 195 come precisely within these guidelines. They are completely neutral and apply across-the-board whether one has or does not have religious beliefs and whether a child or his parents desires to attain religious as well as secular education from a sectarian school.

C. Inquiry into the Religious Practices, if Any, of Schools Attended by Children Eligible for Benefits Under Acts 194 and 195 Would Violate Their Constitutional Rights.

We have previously pointed out in section II B(2) above that plaintiffs have failed utterly to establish that the effect of the legislation under attack is to advance religion. Furthermore, they have failed to establish that any of the nonpublic schools eligible children who attend, bear any resemblance to the religious profile alleged in paragraph 8 of their complaint, and incorrectly asserted as a proved fact at page 4 of their brief and elsewhere. And this is precisely as it should be—for any inquiry that would permit developing the degree of religious involvement, or absence of same of such schools would be not only irrelevant, but would constitute the most pervasive kind of entanglement and a violation of basic constitutional rights.

As noted earlier, there is no disqualifying provision in the Pennsylvania Acts that would require inquiry into, or bar furnishing, benefits to children because of the religious practices of the schools they attend.

Not only is such inquiry not required to pass muster under the Establishment Clause, but to do so would violate the parents' free exercise rights and their traditional freedom of choice and conscience in educating their children and in religion, as well as violate their right of privacy.[45]

45. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117, 129 (S.D. N.Y. 1969) affirmed 401 U.S. 154 (1971); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The individual's right to privacy and freedom of choice was reaffirmed in this Court's recent opinion in *Roe v. Wade*, 410 U.S. 113 (1973). As noted long ago in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922):

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [citations omitted]."

To the same effect, see *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) where the Court upheld the right of parents to provide for sectarian or non-sectarian training of their children. See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Just as an individual has the right to be free from inquiry by the state into the contents of his library, the state cannot tell a man in the privacy of his home what books to read and cannot control a person's private thoughts, *Stanley v. Georgia*, 394 U.S. 557 (1969). So also, the state cannot inquire from a parent as to the reasons for his choice in educating his children or inquire of the school as to its religious practices, if any, to determine eligibility. Any such inquiry invades the private rights of parents as individuals. *Watkins v. United States*, 354 U.S. 178 (1957).

CONCLUSION

Appellants had an opportunity to offer whatever evidence they had—or could develop—to prove the serious allegations they have made. They offered none, and while relegated to arguing only facial unconstitutionality, their brief is peppered with unproved conclusory allegations and speculations—as absurd as the charge that some of the equipment or materials loaned for use in the industrial art program could be used "to construct crosses, crucifixes, and altars" (Appellants' brief, p. 30).

The fact is—and appellants know it,—that the programs under attack are purely educational and purely secular. They are benefits already available to public school children. Extending them to nonpublic school children is clearly a proper subject for public concern and public funds.

Plaintiffs final attack is one they do not really articulate because the authorities are so overwhelming against them. There is nothing in the First Amendment, and no case has ever held that public programs for the direct aid and benefit of an individual,—be they for education or general public welfare,—must exclude persons from benefits because they are enrolled in, or served by an institution that has a sectarian connection.

Happily what appellants contend for is not now the law of the land—and we ask Your Honorable Court to refuse to adopt such an argument that would overturn a long line of precedents to the contrary.

We respectfully urge Your Honorable Court to dismiss the present appeal and affirm the judgment of the court below.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER

By

Henry T. Reath
Jane D. Elliott

Supreme Court, U. S.
FILED
JAN 24 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1765.

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL and AMERICANS FOR SEPARATION OF CHURCH AND STATE,

Appellants,

v.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,

Appellees,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, et al.,

Intervening Parties Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

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ARGUMENT.

Introduction.

The brief of the appellees makes the following arguments.

1. The legislative purpose was secular.

2. The services and materials mandated by the acts are secular in nature and thus do not aid religion.

3. The acts do not involve the State in prohibited entanglement with religious organizations.

4. Appellants failed to offer evidence to prove that the acts had a primary effect of aiding religion and that they involve the State in forbidden relationships with religious organizations.

We will reply to the arguments in the above order.

1. For the Purpose of Argument, Appellants Concede That the Acts Involved Serve a Secular Legislative Purpose.

The two statutes involved contain a recital of a secular purpose. Inasmuch as this Court has generally accepted such a recital at face value, appellants have not taken issue with it and for the purpose of argument, concede that the legislative purpose was secular.

In the court below appellees devoted considerable time in producing testimony to the effect that the services and materials provided by the statutes here involved are of great benefit to students and essential to a modern secondary school. Both groups of intervener appellees emphasize this in their briefs. (*Diaz et al.* at page 15 and *Chesik et al.* at pages 10, 11.) This too is conceded by appellants. But, by the same token, whether called "auxiliary" or not, they are educational services, and thus subject

to the principles applied in *Lemon v. Kurtzman,* 403 U. S. 602 (1971) and *Earley v. DiCenso,* 403 U. S. 602 (1971) and their progeny. Nothing in the First Amendment distinguishes between auxiliary and non-auxiliary educational services.

2. The Services, Textbooks, Equipment and Materials Furnished to Nonpublic Schools Pursuant to Acts 194 and 195 Aid Religion.

In 1972 the State of Illinois adopted legislation to provide auxiliary services, textbooks and equipment for nonpublic schools. In holding the legislation to be unconstitutional the Illinois Supreme Court quoted from *Sloan v. Lemon,* 413 U. S. 825, —, 37 L. Ed. 2d 939, 945, 93 S. Ct. 2982, 2986-2987:

> "The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. We think it plain that this is quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs aiding all parents by supplying bus transportation and secular textbooks for their children. Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the 'verge' of the constitutionally impermissible. Everson v. Board of Education, 300 U. S. 1, 16 (1947)".

Klinger v. Howlett, 56 Ill. 2d 1 at 9, 305 N. E. 2d 129 at 133.

The acts here involved recite the fact that the services, textbooks, equipment and instructional materials are part of the public school program. School administrators called as witnesses by appellees emphasized the fact that the services, equipment and materials were essential ingredients in a modern secondary educational institution. This contradicts the argument of appellees that the so-called "auxiliary services" provided by Act 194 are not part of the regular school program, and therefore, provide merely incidental secular benefits to sectarian schools.

Appellees Diaz et al. called Dr. D. A. Horowitz, Associate Superintendent for Schools and Special Services in the School District of Philadelphia, as a witness. At page A74 of the Appendix we have the following question to Dr. Horowitz and his answer:

> "Q. Now, respecting the auxiliary services under Act 194, have you formed an opinion as to the value, a professional opinion as to the value, of these services to children?
>
> A. I can only judge it in this way, that the auxiliary services that have been enjoyed by pupils in public schools, the schools that I know best, that these services are important to them, to their development, to their education process, to their future vocation, and I can I think fairly assume that they would be just as valuable to any children enrolled in any schools."

See also, Dr. Horowitz's testimony at page A76 and A77 and the testimony of J. Jarvis at pages A109 and A110 of the Appendix.

As Judge Higginbotham pointed out in his dissent (JS 64a) "the sums allocated by the Commonwealth for the implementation of Acts 194 and 195 can by no means be regarded as insubstantial or insignificant." To implement the acts, Pennsylvania appropriated about $31,000,000 for the school term 1972-73 and about $35,000,000 for the school term 1973-74.

Predictably, in 1974 the General Assembly increased the allowance for textbooks under Act 195 from $10.00 to $12.00 per pupil for the school year 1973-74 and to $15.00 per pupil for the school year beginning July 1, 1974. It also increased the allowance for auxiliary services under Act 194 from $30.00 to $36.00 per pupil for the school year beginning July 1, 1974.[1] As Chief Justice Burger said in the first *Lemon* case:

> "Here we are confronted with successive and very likely permanent annual appropriations which benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines is thus likely to be intensified." *Lemon v. Kurtzman,* 403 U. S. 602 at 623.

3. Entanglement of the State With Religion Is Inherent in the Pennsylvania Statutes.

Appellees argue that the fact that the services, equipment and materials are furnished by Intermediate Units[2] rather than by cash payments to the nonpublic schools eliminates the constitutional infirmity of entanglement. The acts were obviously designed in an attempt to avoid the problem in *Lemon v. Kurtzman, supra,* where the court condemned financial aid paid directly to church-related schools. See also *Waltz v. Tax Commissioner,* 397 U. S. 664 at 675:

> "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most

1. Acts Nos. 169 and 170 of 1974, approved July 18, 1974, Purdons Pennsylvania Legislative Service, pp. 472, 473.

2. There are 29 such units in the Commonwealth and each school district is assigned to a unit. The units provide local schools with such services as curriculum development, instructional improvement services, management services, etc. Act No. 120 of 1970, 24 P. S. § 9-951 et seq. (pocket part).

> governmental programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards. . . ."

We fail to see where there is any substantial difference between furnishing services and equipment in kind and providing the schools with the cash to purchase them. The effect is exactly the same.

Furthermore, furnishing services and materials involves the State in a great deal more entanglement with the sectarian schools than simply paying cash to them.

We have described the procedure established by the Pennsylvania Department of Education for nonpublic schools to obtain the account for services and materials under Acts 194 and 195 in our initial brief, and we will not repeat them here. If the defendants fulfill their duty to the taxpayers, the entanglement will be pernicious. It is not enough for the state to issue instructions to nonpublic schools cautioning them against using any of the services or materials to further religious purposes, the state must make sure that the instructions are carried out. "The State must be certain given the Religion Clauses, that subsidized teachers do not inculcate religion. . . ." *Lemon v. Kurtzman, supra,* at 619.

Appellees *Diaz et al.* called several school teachers and administrators who testified that they understood that the programs could not be used for any religious purpose. The court below alluded to this. It said:

> "There is no evidence whatever that the presence of therapists in the schools will involve them in the religious missions of the schools. . . ." (JS 39a)

The testimony of five school employees selected by the parties to this action can hardly guarantee that the hundreds of such employees will abide by directives against

introducing religion into the programs. It would be impossible to examine all of the people involved in delivering the services and using the materials. Appellants saw no point in cross-examining carefully selected witnesses produced by the other parties. As this court stated in *Levitt v. Committee for Public Education,* 413 U. S. 472, the potential for conflict with the First Amendment "inheres in the situation" and "the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination." (Citing *Lemon v. Kurtzman, supra,* 403 U. S. at 617, 619.) The testimony of appellees' witnesses on this issue was immaterial, as is evidenced by the fact that exactly the same type of trial testimony was presented, and in fact accepted by the Court in *Earley v. DiCenso.* See 403 U. S. at 618-619.

The District Court in *Public Funds for Public Schools of N. J. v. Marburger* spoke of the inherent nature of religious influence involved in sending public employees into religious schools in the following words:

> "Moreover, it is clear that the teachers providing such auxiliary services will be functioning within the confines and environment of a given religious institution where a religious atmosphere may be pervasive. Although the teachers of auxiliary services are not employed by a religious organization and are not directly subject to the direction and discipline of a religious authority, they will, nonetheless, be working in atmospheres dedicated to the rearing of children in a particular religious faith. Again it would seem that a constant review of that instruction would be required in order to determine that the religious atmosphere has not caused religion to be reflected—even unintentionally—in the instruction provided by such teachers. Furthermore, the arrangement may provoke some controversy, as noted in *Lemon,* between the auxiliary teachers and the religious authority over the precise meaning and extent of the legislative restraints. See *Lemon v. Kurtzman, supra,* 403 U. S. at 619, 91 S. Ct. 2105." 358 F. Supp. 29 at page 40.

The majority of the District Court recognized that warnings to the teachers and assurances by them would not satisfy the requirements of the Establishment Clause, or it would not have invalidated that part of Act 195 as permitted the furnishing of some instruction equipment.

The school administrators and teachers called by the interveners all testified that they had been warned repeatedly about introducing religious content into the "auxiliary" services program or using equipment and materials supplied under Act 195 for religious purposes. This demonstrates one aspect of the entanglement involved in the situation. For instance, in questioning Sister Mary Dennis Donovan, Coordinator of Human Relations Education for the parochial schools of Pittsburgh, Mr. Ball elicited the following responses:

> "Q. Now, Sister, are you a member of a Roman Catholic teaching order?
>
> "A. I am.
>
> "Q. What is the name of the order?
>
> "A. I belong to the Sisters of St. Joseph of Baden, Pennsylvania.
>
> "Q. Is it your understanding that there are legal restraints on these Acts with respect to religious inculcation?
>
> "A. Definitely.
>
> "Q. How did you come to know about these restraints?

"A. Well, we have repeated and very emphatic directives given to us in regular meetings—I would say the administrative staff and the principals meet with our superintendent, John Chico and the coordinators of Governments on an average of ~~once~~ every two months, and I don't believe we have had a meeting where this hasn't been emphasized."

It is obvious that the parties involved in implementing the acts recognize the potential for unconstitutional conduct on the part of those who carry out the programs. Secondly, it shows unlawful entanglement by the government in religion. Public officials are directing the administration of parochial schools through periodically scheduled meetings.

"It places the State astride a sectarian school and gives it power to dictate what is or is not secular, what is or is not religious." Justice Douglas, concurring in *Lemon v. Kurtzman,* 403 U. S. at 637.

Defendants' brief points out that the Intermediate Units must abide by the nondiscriminatory hiring provisions of 24 P. S. § 1-108, which provides:

"No religious or political test or qualification shall be required for any director, visitor, superintendent, teacher, or other officer, appointee, or employee in the public schools of this Commonwealth."

We submit that this provision simply complicates the problem. There is nothing to prevent the Units from hiring personnel of the same religious affiliation as the schools being served. It would seem highly likely that people who wanted to serve in religious schools would apply for the positions available for providing auxiliary services in the schools of their denomination.

As a matter of fact, it had come to the attention of counsel for appellants that in some cases employees who provided auxiliary services in parochial schools prior to the passage of Act 194 were simply transferred from the parochial school payrolls to the payrolls of the Intermediate Units. As a result, appellants propounded the following interrogatory to the defendants:

"11.(a) State whether any of the persons employed by Defendants or the Intermediate Units to provide auxiliary services were previously employed by the nonpublic schools to which they are assigned." Defendants answered the interrogatory as follows:
"Interrogatory No. 11:

(a) There are some situations where this does exist."[3]

In other words, in at least some cases Act 194 is being used to relieve the non-public schools of the expense of paying the personnel who were employed by them prior to the passage of the act.

4. The Evidence Supports Appellants' Position That the Acts Have a Primary Purpose of Aiding Religion and Involve the State in Prohibited Entanglement with Religion.

In the counterstatement of the case contained in the brief of appellees Jose Diaz et al., it is stated that it is both denied and unproved that most of the schools eligible for benefits under the acts have religiously restrictive admissions and faculty appointment policies, imposed attendance at religious instructions and worship, and have religious restrictions on what the faculty may teach. Similar statements are contained in the briefs of the other appellees.

3. R 1.

Appellants called Robert J. Czekoski, the Coordinator of Non-Public School services for the Pennsylvania Department of Education, who stated that no nonpublic school was barred from receiving benefits under the acts by reason of the fact that it is controlled by a religious organization, has as its purpose the teaching, propagation or promoting of a particular religious faith, imposes religious restrictions on admissions, requires attendance at religious instruction, imposes religious restrictions on faculty appointments or imposes religious restrictions on what the faculty may teach. The only test applied by the Department for qualification for benefits is that the school must fulfill the compulsory attendance requirements of the state. (A44-A49).

On page 161 of the transcript of the proceedings before the lower court (R. 161) the following colloquy appears:

> "Judge Gibbons: Mr. Ball, before you begin, if you will turn to the answers to interrogatories, Interrogatory No. 1, Answer 1(c), a list of schools submitted by school superintendents of the several Roman Catholic Dioceses in Pennsylvania contains the names of 968 schools which are Roman Catholic Diocesan schools. For purposes of this action may we take it as established that those 968 schools at least of the 1320 involved in this program have a religious purpose?
>
> "Mr. Ball: Yes, that can be taken for granted, yes, your Honor.
>
> "Judge Gibbons: Does the Commonwealth so concede?
>
> "Mr. Blewitt: Yes, Your Honor."

The religious mission of Roman Catholic Schools is thus conceded, and it is a well known fact of which the Court should take notice.

This case should not be decided in a vacuum. The schools involved in this case are the same ones involved in *Lemon v. Kurtzman, supra,* and *Sloan v. Lemon, supra.* Reference to those cases provide additional statistics and information concerning the nature of church schools in Pennsylvania and the percentage of students attending such schools.

5. Conclusion.

The sum and substance of Act 194 is that the Intermediate Units are paying educational personnel to go into religious and private schools to perform services which the appellees' own witnesses characterize as part of a modern well-staffed educational program. Under Act 195 the Intermediate Units are buying textbooks, instructional equipment and materials and placing them in sectarian schools, thereby relieving the schools of the expense of obtaining them. The primary effect of the acts is self-evident.

Finally, the acts themselves and the Guidelines adopted for the administration of the acts provide abundant evidence of far more government entanglement in religion than was found in the *Lemon* cases and in the *Nyquist* [4] case.

Respectfully submitted,

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Attorneys for Appellants.

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4. *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U. S. 756 (1973).

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1765

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSLYVANIA JEWISH COMMUNITY RELATIONS COUNCIL and AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,

Appellants,

vs.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,

Appellees,

and

JOSE DIAZ and ENILDA DIAZ, his wife, *et al.*,
Intervening Parties Appellees.

On Appeal from the United States District Court For the Eastern District of Pennsylvania

BRIEF OF AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, BOARD OF CHURCH AND SOCIETY OF THE UNITED METHODIST CHURCH, JEWISH LABOR COMMITTEE, JEWISH WAR VETERANS, NATIONAL EDUCATION ASSOCIATION, NATIONAL COUNCIL OF JEWISH WOMEN, UNION OF AMERICAN HEBREW CONGREGATIONS, UNITED SYNAGOGUE OF AMERICA and UNITARIAN UNIVERSALIST ASSOCIATION, *AMICI CURIAE*

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This brief *amici curiae* is submitted with the consent of the parties.

Statement of the Case

This proceeding was initiated by the appellants (three individual taxpayers and four organizations) against certain officers of the Commonwealth of Pennsylvania challenging the constitutionality of two Pennsylvania statutes, Act 194, July 12, 1972, Pa. Stat. tit. 24, Sec. 9-972, and Act 195, July 12, 1972, Pa. Stat. tit. 24, Sec. 9-972. The statutes provide various forms of aid for the operation of church-affiliated and other nonpublic elementary and high schools. Appellants sought a declaratory judgment that the statutes violate the Religion Clauses of the First Amendment to the United States Constitution and an injunction against their operation.

A three-judge District Court was convened. After appropriate hearings, it issued the following rulings:

1. Dividing 2 to 1, it upheld the provisions of Act 194, under which public school authorities are required to furnish "auxiliary services" to children in nonpublic schools on the premises of their schools, up to a cost of $30 per pupil. The program includes guidance, testing, remedial and "such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth."

2. It unanimously upheld the provisions of Act 195 requiring the state to purchase and to lend to nonpublic school pupils "textbooks which are acceptable for use in any public, elementary, or secondary school of the Commonwealth," up to a limit of $10 per child.

3. It upheld by a vote of 2 to 1, with a limitation noted below, the provisions of Act 195 requiring the state to purchase and to lend "instructional materials and equipment" to nonpublic schools, up to a limit of $25 per child. The loan is to be made on request of a nonpublic school official "on behalf of nonpublic school pupils." The Act defines "instructional materials" as such materials as books, records, tapes and films, and "such other secular, neutral, non-ideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." The term, "instructional equipment," is similarly defined. The court below unanimously ruled that the provision concerning equipment was invalid to the extent that it went beyond equipment which "from its nature cannot readily be diverted to religious purposes, and is particularly designed or designated for such secular educational purposes as provided for in said statute and its accompanying duly-promulgated guidelines for the administration of such statute" (Jurisdictional Statement, pp. 102a-103a).

The plaintiffs noted their appeal to this Court. (No cross-appeal was taken by the defendants from the limitation on the equipment provisions.) This Court noted probable jurisdiction on October 15, 1974.

Question to Which This Brief Is Addressed

Do the provisions of Acts 194 and 195 providing governmental assistance to religiously affiliated elementary and secondary schools in the form of auxiliary services, instructional materials, instructional equipment and textbooks violate the Establishment Clause of the First Amendment to the United States Constitution?

Interest of the *Amici*

The American Association of School Administrators is a voluntary nation-wide organization of school administrators. Its membership includes administrators from all over the country. It supports the submission of this brief *amici curiae* on the basis of its traditional support of the principle of separation of church and state.

The American Jewish Committee, American Jewish Congress, Anti-Defamation League of B'nai B'rith, Jewish Labor Committee, Jewish War Veterans, National Council of Jewish Women, Union of American Hebrew Congregations and United Synagogue of America are national Jewish organizations, each of which is concerned with preservation of the security and constitutional rights of Jews in America through preservation of the security and constitutional rights of all Americans. They are committed to the belief that separation of church and state is the surest guarantee of religious liberty and that it has proved of inestimable value both to religion and to the community generally. They join in this brief because they believe that the program embodied in Acts 194 and 195 would be a

form of aid to religious institutions, bringing in its train the evils that the constitutional guarantee of separation of church and state was designed to prevent.

The Baptist Joint Committee on Public Affairs consists of representatives elected by each of eight cooperating Baptist conventions in the United States: The American Baptist Churches in the U.S.A., the Baptist General Conference, the National Baptist Convention of America, the National Baptist Convention, U.S.A., Inc., the North American Baptist General Conference, the Progressive National Baptist Convention, Inc., the Seventh Day Baptist General Conference, and the Southern Baptist Convention. Among Baptists, religious liberty is a fundamental and sacred principle. It is the opinion of the Baptist Joint Committee on Public Affairs that the principle is jeopardized by the decision on appeal in this case.

The Board of Church and Society of the United Methodist Church is one of the four national program agencies of the Church. Its policies are determined by the Board's 90 members who are elected democratically from five geographical areas of the nation. Among the members of the Board are lawyers, judges, teachers, social workers, business people, homemakers, youth and clergy. The purpose of the Board is "to analyze the issues which confront the person, the local community, the nation and the world and to encourage Christian lines of action * * *."

The National Education Association (NEA) is an independent, voluntary organization of educators open to any person who is actively engaged in the profession of teaching or other educational work, or any other person

interested in advancing the cause of education. It is the largest professional organization in the nation. The NEA has participated as *amicus curiae* in numerous cases before this Court in an effort to strengthen public education by preserving the American tradition of separation of church and state.

The Unitarian Universalist Association is an association of churches and fellowships in the United States and Canada. A resolution adopted by the Association at its 1972 General Assembly said, in part: "• • • the Unitarian Universalist Association reaffirms its support of the principle of separation of church and state in the United States and urges Unitarian Universalist Societies to: Oppose all direct or indirect Federal, state or local tax aid to church-related schools on all levels • • •."

Summary of Argument

The present proceeding represents still another effort to overturn the principle that the First Amendment bars large-scale governmental financing of schools maintained by religious institutions. The decisions of this Court, however, establish that only clearly secular programs involving no substantial support or close supervision by the state are permissible.

I. The provisions in Acts 194 and 195 providing auxiliary services, instructional materials and instructional equipment to parochial schools violate the Establishment Clause.

A. These provisions have a sectarian purpose. There is no clear legislative declaration of a secular purpose and, in any case, such declarations should not be routinely accepted at face value.

B. These provisions likewise have a sectarian effect since the procedures approved by the court below could be used to subsidize most of the operations of a sectarian school.

C. These provisions would involve entanglement of church and state in their administration. It would be necessary for school administrators to adopt procedures designed to ensure that personnel sent to teach in sectarian schools in fact acted independently of the school administration and its religious mission. Prior decisions of this Court proceed on the assumption that it is difficult if not impossible to make sure that any particular teacher is refraining from sectarian activity in the atmosphere of a sectarian school.

With respect to instructional equipment, the limitation imposed by the court below either nullifies that section or means very little. In any case, enforcement of this requirement would require such close and constant supervision of the day-to-day use of equipment as to bring about impermissible entanglement.

D. Finally, the provisions in question would involve political entanglement of church and state. Each time they were to be financed, the legislature would be embroiled in conflicting efforts to have their amounts increased or reduced.

II. The provisions regarding textbooks in Act 195 violate the Establishment Clause. Experience shows that the textbook program approved by this Court in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), has not worked out as expected. In the absence of careful policing, sectarian books have in fact been financed out of state funds. This fault in the program cannot be corrected without an impermissible degree of administrative entanglement.

ARGUMENT

The present proceeding represents still another effort to bring about large-scale governmental financing of schools maintained by religious institutions as part of their religious mission. It is thus a fresh attempt to overturn the precept, taken virtually for granted for more than 150 years, that the First Amendment bars such financing. In the words of this Court in *Everson* v. *Board of Education*, 330 U.S. 1 (1947): "No tax in any amount, large or small, can be levied to support any religious activities or institutions • • •."

At least as it applied to the financing of church-related schools, this declaration was neither startling nor precedent-making. Up to 1947, when it was made, and even for another 20 years, the expenditure of state funds for the benefit of such schools was limited to two areas—health benefits, police and fire protection and similar services as to which there was no constitutional problem, and such "fringe benefits" as busing and textbooks, the latter being extended in only a very few jurisdictions.

A substantial, even qualitative, change took place in the 1960s. The year 1967 saw the enactment of the first statute under which a state undertook to shoulder a significant part of the burden of financing church schools. This was the Pennsylvania statute, invalidated by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), which used the device of having the state "purchase secular services" from the nonpublic schools. In the same decision, the Court invalidated a statute adopted by Rhode Island in 1968 under which the state "supplemented" the salaries of teachers of secular subjects in the nonpublic schools.

The draftsmen of these two statutes had attempted to deal with the First Amendment barrier by subjecting grants of aid to restrictions designed to assure that the aid went only to the secular aspects of the schools involved. They appeared to have little doubt that arrangements in which government funds or other benefits were used for the general operation of sectarian schools would be unconstitutional. It was apparently hoped, however, that the separation requirement could be satisfied by insuring that the funds were not used for general operations. This Court nevertheless held that the plans violated the "entanglement" aspect of the three-way test which it has applied in recent cases. As phrased in *Lemon* (403 U.S. at 612-13), that test reads:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra*, at 647.

With this approach blocked, resort was had to its opposite—the simple arrangement of giving religious schools government assistance without strings attached. This meant going back to the general form of financing which the earlier statutes were designed to avoid. That is what was attempted in the statutes which came before this Court at its 1972-3 Term. They provided, *inter alia*, for per-pupil payments to nonpublic schools for supplying certain services "mandated" by the state, for other payments to cover costs of maintaining facilities and equipment, for reimbursing parents for parts of the tuition they paid to nonpublic schools and for tax benefits to some parents paying such tuition. *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 93 S. Ct. 2955 (1973); *Sloan* v. *Lemon*, 413 U.S. 825, 93 S. Ct. 2982 (1973); and *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472, 93 S. Ct. 2814 (1973).[1] Reiterating its "three-part test" (93 S. Ct. at 2965), as well as the broad ruling in the *Everson* decision quoted above (*id.* at 2969), this Court found that that approach was likewise unconstitutional.

In thus closing off both routes around the constitutional barrier to governmental aid to sectarian schools, this Court gave full recognition to the complaint of supporters of such aid that they were faced with an "insoluble paradox." In closing its opinion in *Sloan*, it said (93 S. Ct. at 2988):

> But if novel forms of aid have not readily been sustained by this Court, the "fault" lies not with the

1. In the *Sloan* decision, it was noted that the provisions in the Pennsylvania statute there invalidated, which barred the state from supervision of the operations of the affected schools, embodied "an effort to avoid the 'entanglement' problems that flawed its [Pennsylvania's] prior aid statute" (93 S. Ct. at 2985).

> doctrines which are said to create a paradox but rather with the Establishment Clause itself: "Congress" and the States by virtue of the Fourteenth Amendment "shall make no law respecting the establishment of religion." With that judgment we are not free to tamper, and while there is "room for play in the joints," *Walz* v. *Tax Commission, supra*, at 669, the Amendment's proscription clearly forecloses Pennsylvania's tuition reimbursement program.

There is nothing surprising about this result. It is merely a reflection of the historic principle that the Constitution bars government from resorting to any device whereby its resources are used to finance religious schools.

In its decision in *Nyquist* (93 S. Ct. at 2959), this Court took occasion to say that it did not regard "Jefferson's metaphoric 'wall of separation' between Church and State" as having "become 'as winding as the famous serpentine wall' he designed for the University of Virginia." It also noted, at two points in its decisions, that, when it upheld the use of state funds to provide transportation to parochial schools in the *Everson* case, it had characterized that arrangement as "approaching the 'verge' of impermissible state aid" (*Nyquist*, 93 S. Ct. at 2966; *Sloan*, *id.* at 2987).[2] It went on to say in *Sloan* (at 2987):

> In *Lemon*, we declined to allow *Everson* to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial support." • • • Again today we decline to approach or overstep the "precipice" of establishment against

2. This language from *Everson* was similarly quoted at the beginning and again at the end of this Court's discussion of the constitutional issue in *Lemon*. 403 U.S. at 611-2, 624.

which the Religion Clauses protect. We hold that Pennsylvania's tuition grant scheme violates the constitutional mandate against the "sponsorship" or "financial support" of religion or religious institutions.

With respect to *Everson* and two later decisions upholding the use of public funds for textbooks at parochial schools and for construction of church-affiliated colleges (*Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Tilton* v. *Richardson*, 403 U.S. 672 (1971)), it said in *Nyquist* (93 S. Ct. at 2967):

> These cases simply recognize that sectarian schools perform secular, educative functions as well as religious functions, and that some forms of aid may be channelled to the secular without providing direct aid to the sectarian. *But the channel is a narrow one, as the above cases illustrate.* (Emphasis supplied.)[3]

Despite the clear thrust of these decisions, the court below insisted that the "Straits of Messina" left by this Court's rulings are still navigable for the substantial scale of state aid provided by Acts 194 and 195 (Jurisdictional Statement, p. 27a). We submit that this Court has made it clear that the Straits can accommodate such shallow-draft vessels as transportation and secular textbooks but not such carriers of massive aid as programs under which teachers on the public payroll give instruction in religiously affiliated

3. At its last Term, this Court, in *Marburger* v. *Public Funds for Public Schools*, 94 S. Ct. 3163 (1974), granted a motion to affirm the ruling of a three-judge District Court invalidating a New Jersey statute having substantially the same effect as the Pennsylvania statutes here involved. *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.C. N.J. 1973). We submit that that ruling, although issued without hearing argument and without written opinion, is entirely at odds with the ruling below in this case and, unless overruled, requires reversal here.

schools or under which educational materials and equipment are supplied for use in such schools. We urge this position in Point I. In Point II, we urge that this Court should also invalidate the provisions in Act 195 dealing with textbooks.

POINT I

The provisions in Acts 194 and 195 providing auxiliary services, instructional materials and instructional equipment for religious elementary and secondary schools violate the Establishment Clause of the First Amendment to the United States Constitution.

The decision below approves the use of state funds for sending teachers into sectarian schools to teach secular subjects and for supplying instructional equipment and materials, without regard to any limit on the amount of this assistance. The statutory ceilings of $30 and $25 per child were not relied upon by the court in reaching its decision. Hence, what the court approved is a procedure that could be used to provide massive government subvention of religious schools. In the words of this Court in *Nyquist* (93 S. Ct. at 2969): "It takes little imagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny."

We submit that this form of aid violates all three aspects of the three-way test referred to above.

A. The Sectarian Purpose

In both its 1971 and its 1973 parochiaid decisions, this Court accepted declarations in the various state statutes before it that their provisions were designed to achieve specific secular purposes (*Lemon* case, 403 U.S. at 613; *Nyquist* case, 93 S. Ct. at 2966; *Sloan* case, 93 S. Ct. at 2985). Accordingly, it found that the statutes met the first part of the three-way test. Nevertheless, at various points in its 1973 opinions, it suggested that the statutes under review had the *purpose* of assisting religion. In discussing tax credits in *Nyquist,* it said that "their purpose and inevitable effect are to aid and advance • • • religious institutions" (93 S. Ct. at 2976; see also 2971). Again, in *Sloan,* it talked of the "intended consequences" of tuition reimbursement (93 S. Ct. at 2986). Thus, it appears that impermissible intent can be found from the nature of the program itself. These remarks even suggest that this Court's acceptance of the legislature's declaration of secular intent as a matter of law is in conflict with its recognition of a sectarian intent as a matter of fact.[4]

The statutes under review in the present case state only that the public welfare requires full development of the intellectual capacities of school-age children and that the provisions of the Acts are intended to insure that every child in the Commonwealth "will equitably share" in certain benefits previously available to children in public schools. (See Jurisdictional Statement, pp. 108a-109a; 112a-113a). It is by no means clear that this can be construed as the same kind of declaration of secular legislative

4. This point is discussed in *Note*: "Establishment Clause Analysis of Legislative and Administrative Aid to Religion," 74 Col. L. Rev. 1175, 1178-81 (1974).

purpose as was embodied in the statutes reviewed in the earlier cases. We submit, however, that, even if it is, the "purpose" aspect of the three-way test loses all significance if this Court routinely accepts such declarations at face value. The purpose of those who have urged these forms of aid to sectarian schools is to insure the continued existence of those schools as instruments for achievement of their religious purposes. *Education* is available in the public schools for those children who now go to nonpublic schools. The reason for demanding that the state finance secular instruction *in the religious schools* is the overriding consideration that the children will there receive religious instruction and that they will receive their secular instruction in the religious atmosphere which these schools have created. That is a religious, not an educational, purpose.

B. The Sectarian Effect

The procedures authorized by these statutes could be used to subsidize most of the operations of a sectarian school. Take, for example, the auxiliary services provisions which authorize use of state funds to pay for "secular • • • services" that are "provided for public school children" in the state. This language describes the entire educational process of the public schools. Thus, the statutory formula would authorize a state subsidy for all educational activities of the parochial schools except those that are sectarian in content. Whether or not the state is now financing so broad a range of services, it could do so under the statutory formula if sufficient financing were supplied.

The court below rejected this argument on the ground that, in fact, something less in the way of services was in

fact being supplied at this time (Jurisdictional Statement, pp. 30a-38a). It said (at 37a) that the statute was not subject "to the open-ended construction plaintiffs suggest" and that there was no evidence from which the likelihood of such construction could be inferred.

In response to this, it should be noted: (1) That the fact that only limited services are now being given may well be attributable to the limited amount of money now available; (2) that the judgment of the court below, unlike its judgment with respect to instructional equipment, does not contain any limitation on its approval of these provisions of the statute; and (3) that nothing in the reasoning of the court's opinion upholding this provision of the statute suggests that its ruling would not be equally applicable to the broad interpretation. The simple fact is that the statute, as worded, does permit the broad interpretation and we doubt that any effort to limit its terms could be made in a manner consistent with this Court's decisions in this area.

The main thrust of this Court's opinions in the 1973 parochiaid cases was that the Constitution prohibits any plan under which the government may "openly subsidize parochial schools" (*Nyquist* case, *supra,* 93 S. Ct. at 2969). We submit that the amount of aid available under the Acts in the form of auxiliary services and educational equipment and materials, even as authorized by the court below, constitutes such subsidization.

The 1973 decisions also made it clear that the "primary effect" aspect of the three-way test does not mean exclusive or even predominant effect. They leave little room for

doubt that a statute cannot be upheld if it has a substantial sectarian effect even though it also has a substantial secular effect. Thus, in *Nyquist,* this Court found it sufficient that the maintenance programs had "a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools" (93 S. Ct. at 2966). This aspect of the ruling was highlighted by Justice White in his dissent where he pointed out that the various New York programs undoubtedly had as one of their effects "preserving the secular functions" of the church-related schools (93 S. Ct. at 2998).

In sum, we submit that, even if the program of governmental support involved here could be conducted without impermissible entanglement, the point we discuss next, it fails under the effect test.

C. Administrative Entanglement

The form of aid—auxiliary services—provided in Act 194 is not markedly different from those which were condemned by this Court in the *Lemon* decision, particularly the arrangement in effect in Rhode Island under which the government paid part of the salaries of teachers in sectarian schools. Here the government would pay the whole salary of teachers who would be sent to teach in sectarian schools.[5]

In *Lemon,* this Court noted that the legislatures of both Pennsylvania and Rhode Island, recognizing the religious orientation of the schools involved, had created "statutory restrictions designed to guarantee the separation be-

5. Although this procedure is not specified in the statute, it is the practice under the implementing regulations, as the court below made clear (Jurisdictional Statement, pp. 28a-29a).

tween secular and religious educational functions and to ensure that State financial aid supports only the former" (403 U.S. at 613). As to the Rhode Island law, it said that the fact that "parochial schools involve substantial religious activity and purpose" had "led the legislature to provide for careful governmental controls and surveillance by state authorities in order to insure that state aid supports only secular education" (403 U.S. at 616).

In this third attempt to provide large-scale financing of parochial schools, Pennsylvania has sought to solve this problem by simply omitting statutory safeguards. But the decisions of this Court make it clear that such safeguards are constitutionally required.

Thus, in *Lemon*, this Court said, concerning the Rhode Island statute there considered (403 U.S. at 619):

> The Rhode Island Legislature has not, *and could not*, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. *The State must be certain, given the Religion Clauses*, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion. (Emphasis supplied.)

The Court went on to say (*ibid*):

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure

> that these restrictions are obeyed and the First Amendment otherwise respected.

Yet it is questionable whether regulations could be drawn that would effectively counter the normal pressures upon those who teach in a school to conform to its policies and atmosphere. To be effective, the regulations and their administration would have to be so comprehensive as to entail an extreme degree of involvement of government officials in the affairs of the school. Indeed, it is this inherent conflict—between the need to attach limitations and the entangling effect of those limitations once they are attached—that creates the "insoluble paradox" referred to above (pp. 10-11) which has the effect of barring all substantial government aid to sectarian schools.

A key aspect of the *Lemon* decision was its conclusion that it is difficult if not impossible to make sure that any particular teacher is refraining from sectarian activity in the atmosphere of a sectarian school. Distinguishing the decision in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), upholding the New York State law under which the state financed the lending of textbooks for use in nonpublic schools, this Court said (403 U.S. at 617) that "teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not." Hence, the "conflict of functions inheres in the situation." Noting that teachers in religious schools are under the direct supervision of a church, the Court said: "Religious authority necessarily pervades the school system" (*ibid*). Although a number of teachers had testified that they did

not inject religion into their secular classes, the Court believed that the record suggested "the potential if not actual hazards of this form of state aid" (*id.* at 618). It found that the necessary supervision of the work of the teachers "will involve excessive and enduring entanglement between state and church" (*id.* at 619).

One of the factors considered significant by this Court in finding improper entanglement in the Rhode Island arrangement is absent here. The teachers whose salaries are paid out of public funds are, at least presumably, appointed by public authorities rather than by those who operate the religious schools. Examination of the *Lemon* opinion, we submit, will show that the fact that the teachers were under the authority of the church was but one of a number of factors deemed significant by the Court. At least as important was the general religious atmosphere of the school, an essential aspect of sectarian institutions.

Furthermore, it is not in reason to assume that those responsible for the overall operation of a school, and particularly for its functioning as an agency for inculcation of a particular religion, will refrain altogether from seeking to influence what goes on in the classrooms. It is hardly likely that these publicly financed activities will operate as independent enclaves within each nonpublic school, subject to direction only by absent public officials. In *Lemon*, this Court pointed to "the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions" (403 U.S. at 619). The same kind of possibility exists here—that of friction over the degree of independence of the teacher. There could also

be differences between private schools and public authorities about the selection of the personnel who are to enter the private schools.

With respect to instructional equipment, it should be noted that the limitation imposed by the court below either nullifies that section or means very little. It is difficult to imagine any kind of instructional equipment that cannot be "diverted to religious purposes"—certainly not in the "projection equipment" or "recording equipment" specifically referred to in the statute. Even "laboratory equipment," also referred to, could be used in courses teaching a religious view of the world about us.

We suggest that compliance with the principles laid down by this Court in its recent cases would require close and constant supervision of the day-to-day use in the schools of any equipment and materials supplied under this statute. Such supervision would of course violate the "entanglement" aspect of the First Amendment. Even if it did not, there would still be the prohibition of political entanglement, to which we now turn.

D. Political Entanglement

As we have seen, the statutes considered by this Court in the 1973 cases sought to avoid the flaw of governmental entanglement which had brought down the statutes considered in 1971. Consequently, the administrative entanglement aspect of the three-way test did not figure prominently in the 1973 rulings. The political aspect of entanglement was, however, invoked.

In *Nyquist,* having found that all three of the challenged programs had "the impermissible effect of advancing religion," this Court said that it was unnecessary to consider whether they would result in entanglement of the state with religion in the sense of "continuing state surveillance" (93 S. Ct. at 2976). It said, however, that, "apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carried grave potential for entanglement in the broader sense of continuing political strife over aid to religion" (*ibid*). The Court (at 2977) referred specifically to its statement in the *Lemon* case (403 U.S. at 623) that:

> The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and population grow.

The Court noted that all three of the programs before it "start out at modest levels," but that experience showed that aid programs "tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies • • •. In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for serious divisive political consequences needs no elaboration" (93 S. Ct. at 2977-8). This factor was found to be applicable even to the tax relief aspect of the New York statute. This Court said that that provision "will not necessarily require annual re-examination, but the pressure for frequent enlargement of the relief is predictable" (93 S. Ct. at 2977).

The discussion of this aspect of entanglement in the *Lemon* decision follows the discussion of administrative

entanglement and starts with a statement that this is a "broader base of entanglement" (403 U.S. at 622). We submit that it is broad enough to include all forms of governmental aid to sectarian schools that involve any substantial amount of expenditure of tax-raised funds.

That is surely the case here. The State of Pennsylvania is presently financing the programs under these two statutes at carefully chosen levels—$30 per child for auxiliary services, $10 for textbooks and $25 for instructional materials and equipment. Each time the matter of financing these programs comes up, these figures will be vulnerable to attack. The Legislature will be under pressure from one side to reduce the volume of aid to the vanishing point and, from the other, to raise it to the point at which it virtually takes over financing of what are considered to be the secular aspects of the sectarian schools' operations.

POINT II

The provisions in Act 195 providing for supplying textbooks for use in religious elementary and secondary schools violate the Establishment Clause of the First Amendment to the United States Constitution.

The court below upheld those portions of Act 195 which provide for the lending of textbooks to children attending nonpublic schools, regarding this aspect of the case as controlled by *Board of Education* v. *Allen,* 392 U.S. 236 (1968). We believe that the provisions of Acts 194 and 195 should be regarded as a single package which, viewed as such, supplies state aid to church-affiliated schools on a scale that is plainly unconstitutional. Without discussing that point, however, we urge here that this Court should

reconsider the assumption on which its ruling in the *Allen* case was based—that no elaborate policing is necessary to ensure that the textbooks furnished by the state are secular rather than sectarian.

That this assumption was vital to the *Allen* decision is clear. This Court said (392 U.S. at 244-45):

> Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval. The law was construed by the Court of Appeals of New York as "merely making available secular textbooks at the request of the individual student," supra, *and the record contains no suggestion that religious books have been loaned.* Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, *are unable to distinguish between secular and religious books* or that they will not honestly discharge their duties under the law. In judging the validity of the statute on this record we must proceed *on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content.* (Emphasis supplied.)

Subsequent experience shows that this assumption has not been borne out. A study of operations under the 1965 New York statute upheld in *Allen* appears in *Note,* "Sectarian Books, the Supreme Court and the Establishment Clause," 79 Yale L.J. 111 (1969). Covering the 1968-69 academic year, the study analyzes the way in which textbooks are reviewed by public authorities in the state, the standards those authorities apply and the books that have

actually been approved for state financing under the statute.

This study found, *inter alia,* that the statute entrusts responsibility for determining sectarian content "to officials without needed qualifications and with extensive other duties" (*id.* at 119), that these officials "generally lack knowledge and expertise needed for determining sectarianism" (124), that some school districts "have sometimes circumvented review responsibility entirely by delegating the screening function to interests wholly outside of the school system," including publishers and even diocesan superintendents (128), that, under the law, a textbook may be financed by the state if it is approved by a single public school district even if it is rejected by other boards on the ground that it is sectarian (129) and that, as a simple matter of fact, "Sectarian textbooks are being purchased under the New York Textbook Loan Law" (138). Summing up, the writers say (at 130):

> The law is complex and burdensome for the thousands of officials responsible for its administration. Its review requirement is shirked or mishandled within many districts. Special provisions of the Law give a state-wide "multiplier effect" to instances of dereliction of textbook review responsibility and review incompetency, while confining the effects of vigilant textbook review to the borders of the vigilant district.[6]

6. It may be suggested that the kind of abuses revealed in the *Yale Law Journal* note do not show that the statute is unconstitutional but only that there have been excesses which should be restrained. We suggest, however, that any such approach would require separate challenge of each textbook improperly approved. This would entail extensive involvement of the courts in litigation over details. As the authors of the note say (at 130): "It is not adequate to rely on judicial review to cure the statutory violations. The violations of the review requirement are not likely to be attacked effectively as they occur."

It should cause no surprise that it has proved to be difficult to police the provision limiting state financing to secular books. The difficulty reflects one facet of the separation principle.

Consider the situation of a public school official asked to approve a specific textbook which a parochial school wishes to use. It may be *A History of the United States I and II* (1965) by Msgr. E. Goebel, Rev. T. Quigley and J. O'Loughlin, described in the *Yale Law Journal* note, pp. 133-134. The text, which carries an imprimatur and *nihil obstat*, contains such passages as, "The State exists for one purpose; the good of the people. This was made clear by Pope Pius XII in his encyclical *Summi Pontificatus* (On the Function of the State in the Modern World). * * *" The official who is asked to approve this text knows that rejection will place him in a position of open conflict with a religious group. He knows, on the other hand, that approval will probably not arouse public comment of any kind. It is no reflection on either public officialdom or sectarian leadership to say that this pressure will frequently result in nullification of the statutory safeguard. In short, in the words of the Law Journal note, the statute demands "from a bureaucracy a performance of which it is incapable" (79 Yale L. J. at 127).

A parallel phenomenon was considered by this Court in the *Lemon* case where one of the issues was whether teachers in a parochial school who were required by statute to refrain from sectarian instruction would be "unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities" (403 U.S. at 619). The Court concluded that, while it could not assume that the teachers *would* be unsuccessful, it was still

true that "the potential for impermissible fostering of religion is present" (*ibid*).

We submit that at least one function of the separation principle is to ensure that public officials are not placed in this kind of dilemma. Public officials must, of course, enforce statutory provisions concerning construction and other safety and health standards imposed not only on church schools but also on churches. They are required also to insure that certain secular subjects are taught in church schools. These responsibilities, however, do not entail making judgments about what is essentially a religious question—whether a textbook on a secular subject which a church school wishes to use (or the instruction given in such a subject) is sectarian. The separation principle is seriously eroded when such procedures are permitted.

Conclusion

It is respectfully submitted that the decision below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
FILED
DEC 20 1974

No. 73-1765

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL AND AMERICANS FOR SEPARATION OF CHURCH AND STATE,

Appellants,

v.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,

Appellees,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, *et al.*,

Intervening Parties Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE COUNCIL FOR AMERICAN PRIVATE EDUCATION, AMICUS CURIAE

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IN THE

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Appellants,

v.

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and

JOSE DIAZ and ENILDA DIAZ, His Wife, *et al.*,

Intervening Parties Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE COUNCIL FOR AMERICAN PRIVATE EDUCATION, AMICUS CURIAE

INTRODUCTORY STATEMENT

The pertinent Pennsylvania constitutional and statutory provisions, the pertinent provisions of the United

States Constitution, and the opinion of the court below, are set out in the briefs by the appellants, the appellees and the intervening parties appellees. This *amicus* accepts them for purposes of its own brief. The facts of record in this case and issues raised on appeal are set out in the brief of the intervening appellee, Jose Diaz, et al., and this *amicus* accepts them for purposes of its own brief. All parties have consented in writing to the filing of this brief *amicus curiae* by the Council for American Private Education (hereinafter CAPE).

THE INTEREST OF THIS AMICUS

CAPE is a nonprofit corporation organized "to assist and strengthen the efforts of the organizations constituting the corporation's membership and the private schools represented by such organizations to serve effectively the free society from which they derive their independence." As its members, CAPE has nine national organizations which operate or serve private elementary and secondary schools throughout the United States (approximately 12,000 schools enrolling 5,000,000 students). The members of CAPE are: American Lutheran Church; Friends Council on Education; Lutheran Church-Missouri Synod, Board of Parish Education; National Association of Episcopal Schools; National Association of Independent Schools; National Catholic Educational Association; National Society for Hebrew Day Schools; National Union of Christian Schools; and United States Catholic Conference.

While the contribution of American private education can remain viable within the framework of the 1971

and 1973 school decisions of this Court, it cannot play an effective role in our national life if the position urged upon this Court by the appellants becomes the law of the land. If the appellants are correct in their interpretation of the First Amendment, that amendment would be much more than a wall of separation between Church and State. The amendment would be an impenetrable barrier between government and the parents and children who exercise their constitutionally protected right to attend private elementary and secondary schools. Fifty years ago this Court unanimously recognized the extraordinary importance of these schools and protected them against those who would have destroyed them outright in the name of Americanism. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Court is now confronted with an indirect attempt to destroy them by cutting off their students and the parents of those students from secular, neutral and non-ideological services, materials and equipment like those provided by Pennsylvania in this case to every school child, regardless of the school he attends.

Appellants charge in their brief that "the common motivating attitude" behind the search by Pennsylvania, Ohio, New York and other states for a constitutionally acceptable form of assistance to the secular education of children attending private schools is that "the Establishment Clause is a necessary evil." (Brief for Appellants, p. 10.) Apparently, they find something sinister in the good-faith attempt by these legislatures to comply with the guidelines which this Court has evolved in a series of cases beginning with *Everson v. Board of Education*, 330 U.S. 1 (1947). If acceptance of the decisions of this Court is the test of adherence

to the No Establishment Clause, it is appellants, not appellees, who must be found wanting since they now call upon the Court to overrule its decision in *Board of Education v. Allen*, 392 U.S. 236 (1968). (Brief for Appellants, pp. 20-23.)

CAPE respectfully suggests to this Court that the ideological differences between appellants and appellees are manifestly much broader and deeper than a disagreement about the limits which the No Establishment Clause imposes upon government aid to private school children and parents. These controversies are not pure questions of constitutional law. They involve radically different visions of the role that government should play in influencing the choice of parents between private and public schools. The forces represented by the appellants are deeply and publicly committed to putting governing weight exclusively on the side of the public schools, and are attempting to use the No Establishment Clause as a bulwark against what they regard as the seduction of private education. Appellants have consistently cast their challenges to programs of assistance for private school children and parents as though the only issue were the establishment of a church. These controversies, however, involve far more than that. They involve the "establishment" of public schools and their value system in the classical sense of "establishment"; the unique institution receiving exclusive government endorsement and support.

CAPE has no controversy with the public schools, with which it is happy to join in the education of American children. But CAPE, which is committed to the preservation of the rightful role of private education in American life, clearly has a controversy with

appellants. It is for that reason that CAPE submits this brief *amicus*.

ARGUMENT

I.

THE PENNSYLVANIA LAWS HERE IN QUESTION ARE CONSTITUTIONAL UNDER THE NO ESTABLISHMENT GUIDELINES ANNOUNCED BY THIS COURT IN THE AID-TO-EDUCATION CASES DECIDED IN 1971 AND 1973.

As the briefs of the appellees and the intervening parties appellees show, the Pennsylvania statutes here in question are fully constitutional under the guidelines established by this Court in 1971 and 1973.[1] This *amicus* is in substantial agreement with the appellees' arguments, and sees no reason to burden the Court with a summary, much less a repetition, of those arguments.

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[1] *Lemon v. Kurtzman* (consolidated with *Earley v. DiCenso*), 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Hunt v. McNair*, 413 U.S. 734 (1973); *Norwood v. Harrison*, 413 U.S. 455 (1973).

II.

THE 1971-73 GUIDELINES SHOULD BE REEXAMINED AND CLARIFIED IN ORDER TO ACHIEVE A BALANCE BETWEEN THE NO ESTABLISHMENT CLAUSE AND THE FREE EXERCISE CLAUSE THAT WILL BE IN BETTER HARMONY WITH (1) THE HISTORICAL PURPOSE OF THE FIRST AMENDMENT, (2) THE TRADITIONAL PRACTICAL IMPLEMENTATION OF THAT AMENDMENT, (3) PARENTAL AND STUDENT RIGHTS IN EDUCATION, AND (4) ACADEMIC PLURALISM IN AMERICAN EDUCATION.

This *amicus* urges the Court to affirm the constitutionality of the Pennsylvania statutes here challenged. Because of the uncertainty and confusion that surround the 1971-73 guidelines in the state and lower federal courts and in the national and state legislatures, the Court should reexamine and clarify the guidelines to bring them into greater constitutional harmony with:

(1) the historical purpose of the First Amendment;

(2) the traditional practical implementation of that Amendment;

(3) parental and student rights in education; and

(4) academic pluralism in American education.

Historical Purpose

The controlling decisions of this Court and the historical scholarship relied upon therein make it clear

that the No Establishment Clause was meant to prevent more than just Congressional establishment of a single national church, just as the Free Exercise Clause was meant to prevent more than just Congressional prohibition of the practice of the Catholic or Jewish religion. To the extent, however, that the original understanding of the First Amendment influences this Court in determining the application of the Religion Clauses today, it is altogether clear that the original understanding of the First Amendment is decisively in favor of the constitutionality of the Pennsylvania statutes involved in this case.

The first Congresses, which contained many members who participated in drafting, proposing and urging the ratification of the Bill of Rights, saw no inconsistency between the Religion Clauses and federal support of education, including religious education. "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." These words are first found in the Northwest Ordinance of 1787, and therefore antedate the Bill of Rights by four years. The same Congress that proposed the First Amendment in 1789 reenacted the Northwest Ordinance of 1787 with the above quoted language.[2] Additionally, subsequent Congresses under the Constitution and Bill of Rights repeatedly incorporated the same language in subsequent ordinances enacted in

[2] *Journals of Congress* (1823 ed) IV, 753: readopted by the First Congress of the United States, Statutes of 1789, c.8 (Aug. 7, 1789).

1800, 1802, 1809, 1818 and 1819.[3] As Isaac Cornelison aptly remarked as long ago as 1895:

> "In view of these facts, it can hardly be held that the founders of our government intended to produce an entire separation of the religion of the people from their civil institutions, and it would be preposterous to assume that they had done what they intended not to do."[4]

The decisions of this Court, starting with *Everson* in 1947, have developed the constitutional principle that government cannot foster or subsidize religion in elementary and secondary schools, be they public or private.[5] This principle is based on post Civil War historical developments that occurred long after the Bill of Rights was adopted. This *amicus* urges the Court, in its reexamination and clarification of No Establishment Clause guidelines, to affirm emphatically that it was never the historical purpose of the First Amendment to bar the states from providing secular, neutral and non-ideological services, equipment and supplies to any

[3] Cornelison, *The Relation of Religion to Civil Government in the United States of America* 112 (1895). Antieau, *Freedom From Federal Establishment* (1963). For other, more recent, scholarly works that illuminate the inadequacy of the historical analysis in the various *Everson* opinions, see Howe, *The Garden and the Wilderness* (1965); Smith, *Religious Liberty in the United States* (1972); and Morgan, *The Supreme Court and Religion* (1972).

[4] *Op. cit.* Cornelison, supra, n. 3, at 120.

[5] *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Engel v. Vitale*, 370 U.S. 421 (1962); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Epperson v. Arkansas*, 393 U.S. 97 (1968); and the cases cited *supra*, n. 1, p. 5.

school children. When a state attempts, as Pennsylvania has, to accommodate parental and student rights by providing the same secular services and materials to all students, regardless of the school they attend, government neutrality towards all religions and religious liberty for all individuals is fully preserved—a result wholly in accord with the historical purpose of the First Amendment.

Appellants stress that the legislation before the Court reflects an attitude that the No Establishment Clause is "a necessary evil". The difficulty with this assertion is that appellants equate the First Amendment with the No Establishment Clause and thus fail to appreciate the attitude of those responsible for the adoption of the First Amendment as well as the motives of the Pennsylvania legislature.

While appellants speak of religious freedom they fail to consider that the generation formulating the First Amendment wrote it to contain both an Establishment Clause and a Free Exercise Clause. Their common understanding was that religion as such should neither be subsidized nor impaired by governmental action.[6] Thus, in 1789 and at the time of the *Schempp* and *Walz* cases the norm was one of government neutrality and accommodation of religion within the limits of neutrality.

We submit that the Free Exercise Clause of the First Amendment is coequal with the Establishment Clause and that together they project a juridical philosophy of religious liberty.

[6] Antieau, *Freedom From Federal Establishment* (1963), p. 160.

This was the position of James Madison in the First Congress. It is fair to assume that Mr. Madison's first recommendation concerning a constitutional amendment for religious liberty was a constitutional synthesis of his thinking on the subject, reflecting both Virginia's Bill for Religious Liberty and the Memorial and Remonstrance. On June 8, 1789, James Madison rose in the House and stated:

> "The amendments which have occurred to me proper to be recommended by Congress to the State Legislatures, are these . . . Fourthly, that in Article 1st, Section 9, between clauses 3 and 4 to be inserted these clauses, 'The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full equal right of conscience in any manner or on any pretext be infringed.' "[7]

Madison placed great stress on the proposition that civil rights should not be abridged on account of religious belief. This is involved in the issues before this Court. Appellants doctrinaire interpretation of the No Establishment Clause would deprive students and parents of the opportunity of participating in basic public welfare legislation especially because of their religious affiliation or association with the schools. Moreover, children attending private schools without any particular religious affiliation are especially penalized. In short, the Commonwealth of Pennsylvania has acted in the Madisonian tradition of the First Amendment, being prompted particularly by religious liberty considerations in the context of preserving a

[7] *Annals of Congress I*, pp. 433-434.

viable parental liberty in the area of education. The brief historical recitation confirms the conclusion that the framers, including Madison, never intended the First Amendment to bar Pennsylvania from providing the public welfare benefits of secular, neutral and non-ideological services, materials and equipment to all children.

Practical Implementation

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), this Court sustained the constitutionality of the traditional inclusion of houses of worship in the group of organizations exempted from the real property tax. After noting the "considerable internal inconsistency" in the earlier Religion Clause decisions of this Court, Chief Justice Burger observed:

> "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." (397 U.S. at 669.)

The history of church-state relationships in the United States shows that property tax exemptions are far from the only instance of "room for play in the

joints" and of "benevolent neutrality." It is precisely the multiplicity of the instances of "benevolent neutrality" that makes it impossible for the course of constitutional neutrality to be an absolutely straight line. Neither the No Establishment Clause nor the Free Exercise Clause has been implemented in a doctrinaire manner. Chaplains are provided at public expense for persons in the armed forces, public hospitals and prisons. In the field of social welfare, the examples of cooperation among federal, state and private (including church-related) organizations are legion. Many state and federal laws create exemptions to accommodate various religious beliefs and practices. This Court itself has held that, in light of our traditional implementation of both Religion Clauses of the First Amendment, certain exemptions from general secular laws are mandatory.[8]

Specifically, in the field of elementary and secondary education our nation has demonstrated the same determination to avoid ideological extremes and to achieve practical religious neutrality and freedom. Private schools, including church-related institutions, enjoy the same tax exemptions and basic municipal services as public schools. This Court has explicitly sustained the constitutionality of providing safe transportation and secular textbooks to all school children,

[8] *Jones v. Opelika*, 316 U.S. 584, (1942), reversed on rehearing, 319 U.S. 103 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Of course, not all exemptions are mandatory: *Sunday Closing Law Cases*, 366 U.S. 420, 582, 599, 617 (1961). Only one, however, has been held forbidden: the New York income tax "adjustment" in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

public and private. *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968). And in *Lemon v. Kurtzman, supra,* in which this Court struck down the Pennsylvania purchase-of-services program and the Rhode Island teachers' salary supplements, this Court was also careful explicitly to reaffirm the constitutionality of general transportation and textbook programs and, more generally, of "secular, neutral or non-ideological services, facilities or materials . . . supplied in common to all students." 403 U.S. 602, 616 (1971).

The question now before the Court is whether the services, books, materials, and equipment made available by the Pennsylvania statutes here in question fit within the guidelines of generality and secularity established in the *Lemon* case. We think it manifest that they do, and will not burden the Court by repeating the arguments ably presented to this effect in the briefs of the various appellees. This Court should declare that these Pennsylvania statutes are in the mainstream of the American practical implementation and accommodation of the Religion Clauses of the First Amendment.

Parental and Student Rights

From the viewpoint of parents and students, one of the most confusing aspects of the school-aid decisions of 1971 and 1973 was the Court's failure to consider the non-religious dimension of *parental* and *student* rights. The *Lemon, Nyquist* and *Levitt* cases treat the choice of a non-public school as if it were simply the free exercise of religion. There is, however, something equally fundamental at stake: basic civil rights, namely,

the parental and academic rights vindicated by this Court in *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v Society of Sisters*, 268 U.S. 510 (1925), and *West Virginia State Board of Education v Barnette*, 319 U.S. 624 (1943).

Among the schools operated or served by the membership of this *amicus*, there are numerous institutions that make no religious demands whatever on the students or parents. Moreover, it has been abundantly clear that, for many years, especially in the inner city areas, there are many parents who choose church-related, nonpublic schools for secular, not sectarian, reasons. The basic, nonreligious rights of many parents and students should not be disregarded in the name of No Establishment. An image of the nonpublic school that has been repeatedly represented to this Court is that created by the appellants' "profile." (Brief for Appellants, p.4.) That profile, each element of which appellants claim constitutionally disqualifies every child and parent in the school from general, secular government services (Brief for Appellants, p.18), does not fit many of the schools served or operated by the membership of this *amicus*. Even in those membership schools that do have some elements of the profile the parents and students are seeking far more than religious education. They are exercising the rights guaranteed them by the First and Fourteenth Amendments and recognized by *Meyer*, *Pierce* and *Barnette*.

The exercise of a constitutional right creates no claim to government subsidy for the exercise of that right. *Norwood v Harrison*, 413 U.S. 455 (1973). But extremely serious constitutional questions arise when the exercise of a constitutional right is used as the basis

of withdrawal of general governmental services or facilities from private individuals or groups. This is more true when the constitutional right of freedom of association is used to exclude persons on the basis of their race or color. *Gilmore v. City of Montgomery, Alabama*, 417 U.S. 556 (1974). It should be, and is, also true in the case of those who exercise their parental, academic, and religious rights in a way which discriminates invidiously against no one.

By choosing to provide all students, regardless of the school they attend, with certain secular services, books, materials, and equipment, Pennsylvania has shown proper recognition of the basic parental and academic rights involved in the choice of a nonpublic school. By circumscribing the assistance provided to these parents and students so as not to transgress the restrictions established by this Court in the *Lemon*, *Sloan*, *Nyquist* and *Levitt* cases, Pennsylvania conformed to the prohibitions of the No Establishment Clause. For this Court to hold the Pennsylvania statutes unconstitutional because *some* schools fit within one or more elements of appellants' "profile" would, in practical effect, be the same thing as holding under this legislation that *no* parents and *no* child attending *any* nonpublic school will receive the secular, general educational services provided by Pennsylvania to all school children. Such a holding would be an extreme penalty on the exercise of the parental and academic rights vindicated by this Court in *Meyer*, *Pierce* and *Barnette*. Moreover, there is nothing in the record to support appellants' suggested "profile", nor that any schools meet all of the asserted characteristics.

Academic Pluralism

Twenty years ago this Court recognized the vital role that education plays in our society, and the vital role that public schools play in education. *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Lemon, Sloan, Nyquist* and *Levitt*, as well as in *Everson* and *Allen*, this Court has also recognized the significant contributions of private, including church-related, schools to American education. Unfortunately, however, the main impact of the Court's decisions in the last two decades has been to favor public schools at the expense of private schools. The effect although not the intent of the Court's decisions has been to tilt the economic balance precariously towards a monopoly of elementary and secondary education by governmental institutions.

Private schools, whether church-related or not, have made a significant contribution to pluralism in American education and therefore in the American body politic. If these schools were mere "conduits" to the churches, there would be no constitutional reason to justify even carefully limited legislative efforts to preserve academic pluralism. But, as this Court noted in *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), the schools are important conduits to the community at large. Consequently, more than sufficient constitutional justification exists for the government's concern for the continued viability of private schools.

This Court has already ruled in the *Lemon, Sloan, Nyquist*, and *Levitt* cases that, with respect to elementary and secondary schools that have a substantial relationship with a church, the government

cannot subsidize the costs of basic maintenance or instruction. Whatever justification might be found in considerations of academic pluralism for such subsidies has been nullified by the strict interpretations of the No Establishment Clause. Most certainly, however, as this Court has recognized, there is a limit to the logic of the No Establishment Clause. In the present case, Pennsylvania has extended to private school students and parents only those auxiliary, secular, neutral and non-ideological services, materials, and equipment that Pennsylvania also provides to public school parents and students. If the Constitution forbids Pennsylvania to do so, then the effective contribution of academic pluralism to American society is seriously impaired.

For more than 25 years, this Court has been engaged in the task of constructing suitable guidelines for the legislature to follow in accommodating the competing demands of the No Establishment Clause and the Free Exercise Clause so that the historical purpose of the First Amendment, its traditional implementation, parental and student rights in education, and academic pluralism can all be given their appropriate constitutional weight. The spate of litigation in the last five years is ample proof that the guidelines heretofore enunciated by the Court have not been sufficient to achieve their intended effect. It is for that reason that this *amicus* now turns to the need for reexamination and clarification of the guidelines in this extremely sensitive and important constitutional area.

III.

IN PARTICULAR, THE GUIDELINES ON "PRIMARY EFFECT," "POLITICAL ENTANGLEMENT," AND APPLICATION OF "POTENTIAL FOR ESTABLISHMENT" SHOULD BE REEXAMINED AND CLARIFIED.

One of the most remarkable aspects of the church-state decisions by this Court in the last 12 years has been the shifting emphasis in the guidelines. *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), was a major attempt to establish a universal test for the No Establishment Clause: the secular purpose and primary secular effect test. The *Schempp* test was applied in 1968 in *Board of Education v. Allen*, 392 U.S. 236 (1968), but two years later the Court found the test inadequate for resolving the tax exemption issue in *Walz v. Tax Commission*, 397 U.S. 664 (1970). As the Court emphasized in *Walz*, considerable attention must also be paid to our historical traditions in applying the strictures of the No Establishment Clause. Moreover, in assessing the present constitutionality of continuing such traditions, considerable weight must be given to the question whether a particular tradition enhances or minimizes administrative entanglement between government and the churches.

One year later, however, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), relying on *Walz*, the Court found it necessary to add more elements: the "potential for establishment" and "political divisiveness." Under the first of those elements it was not sufficient for a

program to avoid any actual establishment of religion; it was also necessary for the program to avoid any significant potential for establishment. The second element in 1971, "political divisiveness," was incorporated by the Court into the concept of "entanglement."

As a result of these decisions, the 1973 aid-to-education cases were argued in terms of a three-pronged test against actual or potential establishment: secular purpose, primary secular effect, and entanglement, both administrative and political. The actual decisions, however, in *Sloan v. Lemon*, 413 U.S. 825 (1973) and the two PEARL cases, *Nyquist* and *Levitt*, 413 U.S. 756,472 (1973), made a most significant change in the "primary effect" test. The question was no longer whether the statutes, as in the *Sunday Closing Law Cases*, 366 U.S. 420, 582, 599, 617 (1961), had a dominant secular effect, but whether the statute had "the direct and substantial advancement of religion." *Committee for Public Education v. Nyquist*, 413 U.S. at 783, n. 39.

This constant reformulation by the Court of the No Establishment guidelines suggests the Court's continuing concern with the results that the previously announced guidelines would have produced in certain of the cases. And yet, the Court has consistently and wisely refused to accept the simplistic guideline which has been urged upon this Court by some of the appellants ever since 1947: that *any* resulting aid to religion renders a statute unconstitutional. As Mr. Justice Powell stated for the Court in *Hunt v. McNair*, 413 U.S. 734, 742-43 (1973):

> "Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution

> with a religious affiliation has consistently been rejected. (citations omitted.) Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."

The complexity of the guidelines established by the Court and their somewhat erratic application by the Court has caused considerable confusion in the national and state legislatures and in the state and lower federal courts. The Court itself warned in the 1973 aid-to-education cases that the present guidelines "are no more than helpful signposts." *Hunt v. McNair*, 413 U.S. at 741. Obviously, there is a need for greater clarity, reliability and predictability.

The complexity of the traditional relationships between religion and government in our country requires, as the Court has held and we agree, a complex set of guidelines to ensure the preservation of the No Establishment Clause, the Free Exercise Clause, and the "play in the joints" between the two clauses. It does not follow, however, that the guidelines must be so imprecise that in their application no one can be sure until this Court announces its decision how a particular case will be resolved. Some uncertainty in constitutional law is inevitable, but not as much as confronts legislatures today.

This case provides the Court with an opportunity to settle the law clearly, not only with respect to the statutes directly in question, but with respect to the basic principle that individual children and parents do not lose their right to share in public educational programs that are made generally available to all

students and parents, that are truly secular, and that are not capable of being diverted into programs of direct or indirect financial assistance for the costs of basic maintenance and basic instruction in church-related elementary and secondary schools. In this case, the Court should clearly reaffirm what it said in *Lemon v. Kurtzman*: that participation by private school students, including those attending church-related schools, in generally available busing, textbook and lunch programs, and in other generally available, secular, neutral and nonideological services, facilities and materials, does not offend the No Establishment Clause.

To make this reaffirmation, the Court does not necessarily have to retract anything it said in *Sloan*, *Nyquist*, or *Levitt*. Nevertheless, it would be helpful if the Court would reexamine and clarify some of the tests that have been causing considerable confusion. These points include the "primary effect" test, the "entanglement" test, and the "potential for establishment" test.

In refusing to make the "metaphysical judgment" about whether the secular or the religious benefit was greater in the *Nyquist* case, this Court seemed to substitute a negative test (no substantial advancement of religion) for the positive test (primary, religiously neutral, secular effect) of the *Schempp* case. But the judgment about what substantially advances religion is frequently at least as "metaphysical" as the judgment whether a particular law advances the secular interests of society more or less than the religious interests of society. In some cases, as in *Schempp*, the advancement of religion may be so palpably the purpose and effect of the legislation that there is no room for doubt. But

in many cases, and especially in those in which there is no doubt of the secularity of the legislature's purpose, the estimate of how much, if any, benefit will accrue to religion from the legislation will be exceedingly difficult, if not impossible, to make.

This Court has never held itself out as an expert on philosophy, theology, or religion. See *Roe v. Wade*, 410 U.S. 113 (1973). This Court should not, except in the most glaring cases, make the constitutionality of secularly motivated legislation turn on whether the effect on "religion" is "substantial and direct" or "remote and incidental." Such tests were once used to limit the power of the federal and state governments in the field of interstate commerce, but have long since been abandoned as inadequate for the task for which they were constructed. The tests are just as inadequate in the area of the complex relationships of religion and American society.

The "entanglement" test also needs reexamination and clarification. While there can be no doubt that excessive "administrative" entanglement is inconsistent with the basic purpose of the No Establishment Clause to separate purely religious concerns from governmental scrutiny, supervision and control, the doctrine of "political entanglement or divisiveness" is at war not only with the Religion Clauses but with all the other clauses in the First Amendment and the entire framework of the Constitution. The Court should consider the fact that it developed this doctrine in *Lemon v. Kurtzman* without any necessity and without any historical or legal foundation. Organized religion

has always been,[9] is now, and forever will be a voice in American political discussions. Serious consideration of the implications of this doctrine will convince this Court that the doctrine of "political entanglement" must be banished as totally inconsistent with our history and the political guarantees of the First Amendment. It is not wholesome neutrality, but hostility, to attempt to silence the churches on matters of vital public concern. If this can be done for churches it can readily be done for other groups.

Finally, this Court should reexamine and clarify the "potential for establishment" test that was first announced by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This doctrine is being interpreted by some of the lower federal and by some of the state courts as though the slightest possibility of a violation of the Establishment Clause were sufficient to invalidate an entire legislative program. There is no way to eliminate the *possibility* of the abuse of power, money, sex, or education. When the actual record of a case demonstrates, as the record in this case does, that there has been no abuse, present legislation should not be annulled because somebody *could* abuse it. Anything can be abused, even powers of government.

In urging this Court once more to reexamine and clarify the guidelines for the Religion Clauses of the First Amendment, this *amicus* recognizes that it is asking the Court to make still another shift in the guidelines after there have already been so many.

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[9] See an excellent discussion in Strout, *The New Heaven and New Earth: Political Religion in America.* (1974).

Nevertheless, this *amicus* urges the Court, now that it has decided the unconstitutionality of government subsidies to church-related schools for the costs of their basic maintenance and instruction, to resolve with equal firmness the constitutionality of the participation of all school children in programs that provide secular auxiliary services, books, materials, and equipment. To decide this second proposition, the Court need only reaffirm what it has already said on the subject in *Lemon v. Kurtzman.* But it will be of inestimable benefit to the future of government neutrality, religious freedom, and private education if the Court re-invigorates the "play in the joints" that has been endangered by exaggerated applications of certain of the guidelines announced in *Sloan, Nyquist,* and *Levitt.*

CONCLUSION

The Constitution is a deliberately concise document. To treat the Constitution as if it contained a definitive requirement or prohibition on all the manifold relationships of government and education or government and religion is to make precisely the same mistake the Court made in *Lochner v. New York*, 198 U.S. 45 (1905). It is just as wrong for the appellants to urge this Court to use the No Establishment Clause to write the appellants' predilections and philosophies about education into the First Amendment as it was for businessmen to urge the Court to write laissez-faire into the Due Process Clause.

The Religion Clauses put definite limits on what the states and the federal government may do in the area of

religion and society; but those limits are at the *outer boundaries* of the social arena in which both government and religion must function. Within these outer constitutional boundaries, there is considerable room for "play in the joints." Any other interpretation of the Religion Clauses converts them into precisely what the Constitution is not: a detailed code containing the answer to every conceivable legal question.

For these reasons, this *amicus* respectfully urges this Court to affirm the judgment of the district court.

Respectfully submitted,

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December 20, 1974

MOTION FILED

DEC 23 1974

IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1765

SYLVIA MEEK, *et al.*,
Appellants,

v.

JOHN C. PITTINGER, *et al.*,
Appellees,

and

JOSE DIAZ, *et al.*,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN NO. 73-1765 and BRIEF AMICUS CURIAE For the National Audio-Visual Association, Inc.

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IN THE

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No. 73-1765

SYLVIA MEEK, *et al., Appellants*

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JOHN C. PITTINGER, *et al., Appellees*

and

JOSE DIAZ, *et al., Appellees*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN NO. 73-1765

The National Audio-Visual Association, Inc., a non-profit corporation of the State of Virginia, headquartering in Fairfax, Virginia is a national trade association comprising membership within the broad spectrum of audio-visual educational and technological fields of endeavor, hereinafter referred to as NAVA.

NAVA, as a Movant, has sought consent of the parties set forth as Appellants and Appellees in this case. Counsel for Appellants and the Chesik Appellees have consented to the filing of the brief. Counsel for Appellees Pittinger et al. and Diaz

et al. have not. Therefore, this application for leave to file the Brief Amicus Curiae attached to this motion is presented under Rule 42 (3) prior to the expiration of the filing date of the briefs of the parties being supported herein.

Within the organization of NAVA are approximately 370 professional educators, librarians, and technical professionals who have a direct and compelling interest in the sustaining of the opinion of the Three Judge Federal District Court now being considered on the merits.

NAVA submits that a vital issue of construction of the Fourteenth Amendment to the Constitution of the United States should be adjudicated in this proceeding.

Appellants seek reversal of the Court below on the constitutional grounds that Acts 194 and 195 of the Pennsylvania Legislature violate the Establishment Clause of the First Amendment. They contend that to provide benefits to children who attend religious schools requires surveillance to ensure secularity and they seek to limit the First Amendment's Free Exercise Clause.

Movant submits that the failure of the State of Pennsylvania to provide children attending non-public schools with the same advantages already provided public school students creates a disparity of educational facilities resulting in unequal protection of the laws and substantive due process of law.

To presume that non-public, parochial and private schools will subvert that which the legislature plainly manifests to be secular is to minimize the constitutional guarantees of the Fourteenth Amendment for the unnecessary insulation of the Establishment Clause of the First Amendment. Absent any evidence to the contrary, it should be presumed that those who fulfill the carrying-out of the benefits ordained by the legislature are persons to whom honor and integrity would be presumed and of paramount importance.

The scope of the problems and the issues raised in this case should be construed in the light of both the First Amendment to the Constitution and the Fourteenth Amendment. Movant's compelling interest is on behalf of equal treatment of school children regardless of whether those children attend a public

school or a non-public school as long as both kinds of schools achieve the state standards. In the course of developing standards, the judicial construction of the state's obligation to provide the best education obtainable should not be reduced by limitations that are founded upon presumed diversion and presumed bad faith on the part of those persons administering the secular guidelines of both the legislature and the Court below.

Movant, on behalf of its membership, is deeply concerned that children in non-public schools shall have the benefits, privileges and protection of both First Amendment Freedom of Exercise and the Fourteenth Amendment.

Accordingly, Movant respectfully requests that the Court grant leave to file the attached Brief Amicus Curiae.

Respectfully submitted,

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BRIEF AMICUS CURIAE

AMICUS CURIAE AND INTEREST OF AMICUS CURIAE

Insofar as Amicus has been required to file the attached Motion for Leave to File this Brief Amicus Curiae, this Brief proper shall not repeat either a description of Amicus or reiterate the interests which have compelled Amicus to file this Brief.

STATEMENT OF CASE AND SUMMARY OF ARGUMENT

Students of the Commonwealth of Pennsylvania who have chosen to attend non-public institutions in furtherance of their religious beliefs have had their freedom to exercise religion unduly burdened by the fact that the educational benefits available in public schools were superior to those in non-public institutions. Therefore, a student was faced with the choice of either forfeiting otherwise available public education facilities for the sake of his religious pursuits, or forsaking his religious school training in favor of acquiring added secular educational benefits.

Under the so-called "new equal protection" or "substantive equal protection" analysis, as enunciated in *Shapiro v. Thompson*, 394 U.S. 618 (1969), and most clearly refined in Mr. Justice Harlan's dissent therein, classifications which are wholly arbitrary or capricious ("invidious") or which are based upon "suspect" criteria and classifications which adversely affect "fundamental rights" will be held to be violative of the Equal Protection Clause of the Fourteenth Amendment, unless they are otherwise justified by a "compelling" state interest.

Although Equal Protection Clause analysis, whether in the traditional form or that of more recent vintage, is most often utilized to attack statutory schemes of state legislatures which create arbitrary classes by their enactment and bestow benefits upon some members whilst denying the same to others, case law development has adequately shown that a state need not have undertaken any truly active conduct to be guilty of so-called "state action". Thus, state action—as required under the Equal Protection Clause—includes not only action taken by the executive, legislative or judicial branches of government but also those indirect actions created by delegating public functions to private organizations and those actions which otherwise control, affirm or to some extent become involved with otherwise private action. Thus, the acquiescence by the state in conduct or a state of affairs, over which it has authority to exercise control through traditional police power or gentral welface provisions, is tantamount to "state action". The thrust of all this is that discrimination may exist though there may, in fact, have been no

formal governmental classification in the traditional legislative sense, but only the toleration by a government of conditions which have either created or have served to heighten pre-existing inequities and thereby perpetuated unfair differences among individuals.

And so it was in the Commonwealth of Pennsylvania prior to the General Assembly's passage of Acts 194 and 195. The state legislature had already long provided to public school students the auxiliary services and educational materials and equipment which 194 and 195, respectively, sought to bestow upon non-public school students. In this context, therefore, the challenged statutes were merely remedial, an effort by the legislature to equalize the educational opportunities available to all children within the Commonwealth, and from this perspective it becomes clear, then, that the educational facilities available prior to 194 and 195 were exemplary of the unequal protection of the law suffered by some children—namely, those attending non-public schools—in the Commonwealth at that time.

From within the above framework the issues of this controversy have arisen. The opponents to Acts 194 and 195 challenge their constitutionality upon the principle that the aid offered Pennsylvania's non-public institutions constitutes a benefit or subsidy to such religious schools in contravention of the Establishment Clause of the First Amendment, made applicable to the state via the Fourteenth Amendment. It has also been argued, on a more refined level, that the nature of such aid would necessitate continued surveillance by the state and thus create the sort of administrative "entanglement" between church and state prohibited as unconstitutional in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Amicus endorses the responses afforded by Appellees but wishes to present additional arguments in support of Acts 194 and 195, and as it may have become clear from the introductory part of this brief, the nature of such supporting arguments center upon the Equal Protection Clause of the Fourteenth Amendment.

Distilled to its essence the position of amicus can be stated quite simply. Prior to the enactment of Acts 194 and 195 the

inequality of educational facilities available to public vis-a-vis non-public school children created a burden upon the free exercise of religion by such children insofar as they were forced to abandon their religious school in order to seek the maximum in educational training. The free exercise of religion is an absolutely "fundamental", constitutionally guaranteed right; the right to an education, though of lesser status than a constitutional right, is fundamental in developing the capacity to exercise the most basic of rights—those bestowed under the First Amendment—and thus becomes a pivotal right. Acts 194 and 195 remedied the inequities of educational benefits offered public and non-public school students and thus served to unburden the free exercise rights of children in the Commonwealth who desired to attend non-public schools, and the Pennsylvania General Assembly specifically noted that these Acts served the general welfare of the Commonwealth in aiding education to *all* schools. Therefore, inasmuch as the striking down of 194 and 195 would resurrect the aforementioned inequalities, unless the opponents of these two Acts can show a "compelling" state interest to do so, the doctrine of the new substantive equal protection would necessitate that such Acts be upheld; the only "compelling" interest put forth by the opponents is that (a) the state must maintain a wall between church and state and (b) the benefits accruing under the Acts would fail to satisfy the non-entanglement requirement in *Lemon v. Kurtzman, supra.* And, since amicus believes that Appellees have carried their burden of refuting the opponents' above contentions, amicus would urge this Court to uphold the constitutional validity of Acts 194 and 195 and not forsake the aid which they offer to the children of Pennsylvania.

ARGUMENT

I. THE FREEDOM TO PRACTICE RELIGIOUS BELIEFS IS A FUNDAMENTAL RIGHT GUARANTEED BY THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH.

The First Amendment provides that Congress shall make no law prohibiting the free exercise of religion. This freedom of religion is guaranteed against state infringement by the Due Process Clause of the Fourteenth Amendment, i.e., the right to pursue any religion according to the dictates of one's own conviction is inherent in the concept of "life and liberty" protected by the Fourteenth Amendment. *Hamilton v. Regents,* 293 U.S. 245 (1934).

The Free Exercise clause is designed to protect against governmental compulsion as to an individual's religious practices and would include governmental action, whether state or federal, which would impede an individual's observance of his individual religious beliefs. *Gillette v. U.S.,* 401 U.S. 437 (1971).

All that is required under this clause to activate a plaintiff's standing is his claim that some governmental action or omission operated against him as an individual in the practice of his religion, and that the effect of such action had been so coercive as to constitute an interference with his personal right of worship. *McGowan v. Maryland,* 366 U.S. 420 (1950); *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963).

In regard to students per se, and their parents, prior decisions of this Court have fostered the view that the Free Exercise clause guarantees rights sufficiently exulted or "fundamental" so as to predominate over state regulatory legislation which was otherwise reasonable and serving a legitimate or valid state purpose. The fundamentalness of both the student's and the parent's right to chart a child's educational course have been borne out.[1]

[1] For example, it has already been determined that although a state may properly prescribe minimum educational standards for all children in the state, the state cannot, however, mandate that all children therein be educated in public schools.

In the instant case it cannot be denied that so long as the Pennsylvania non-public schools meet the state-imposed minimum standards for accreditation, a child's choice to attend such a non-public school, in furtherance of his religious beliefs, is a choice which is constitutionally fundamental and protected under the Free Exercise Clause as applied to the state through the Fourteenth Amendment.

II. THOUGH THE RIGHT TO AN EDUCATION MAY BE OF LESS CONSTITUTIONAL STATURE THAN THE RIGHT TO PRACTICE ONE'S RELIGION, THERE IS, NONETHELESS, A VALID STATE INTEREST TO BE SERVED IN EDUCATING ALL CHILDREN WITHIN THE STATE.

This Court has suggested that a free public education is a privilege which the State may bestow upon citizens, not a constitutionally guaranteed right. See *Missouri ex rel. Gains v. Canada,* 305 U.S. 337 (1938). There can be no doubt, however, that in our society an extremely close nexus exists between the education of citizens and the exercise of those rights and values that have been deemed as constitutionally guaranteed.

The classroom itself has been referred to by this Court as the "market-place of ideas". *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967). This Court, furthermore, has written that students in general have the right "to inquire, to study, and to evaluate to gain new maturity and understanding . . . ." *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957). It would seem axiomatic that some degree of formal education would be necessary for any individual to even appreciate, let alone exercise those most fundamental of constitutional rights

Pierce v. Society of Sisters, 268 U.S. 510 (1925). The rationale in *Pierce* was that such a mandate constituted an interference with the parent's right, as protected under the due protection clause of the Fourteenth Amendment, to dictate the type of education which their child shall receive. Further the Court has held a more extreme position that a state's interest in compulsory education can be outweighed, by a balancing of interests, by the parent's "free exercise" rights. *Wisconsin v. Yoder,* 406 U.S. 205 (1972). In that case, the informal education fostered by the Amish, which had enjoyed a three hundred year long history was considered part of their religious way of life. On the other hand certain religious practices—such as polygamy and bigamy [*Reynolds v. U.S.,* 98 U.S. 145 (1878)] and anti-X-ray and vaccination practices [*Jacobson v. Massachusetts,* 197 U.S. 11 (1905)]—have been outweighed by state regulatory legislation.

as conferred upon him by the First Amendment, for how could any citizen take advantage of his right to exercise free speech, to form associations or to take in this country's political process, unless he has been prepared to gather, to evaluate, and then to act upon the information to which he is exposed in an intelligent manner?

It is important to note, moreover, that whereas the right to education may not be of constitutional stature it still holds a rather unique place in terms of priorities. The state, of course, has no affirmative duty to provide its inhabitants with a minimum standard of living. Several reasons may be suggested why this duty has failed to gain the dignity of a constitutional right. The most obvious reason, however, would seem to be that the guarantee of a minimum standard of living would appear to be on an entirely different level of fundamentalness from, say, effectively equal access to the criminal process or the political process. But, although it would be mistaken to extend the equal protection clause to such a guarantee, would this be true in the case of education? Is not the provision of an education as a state benefit proper precisely because it is the sort of benefit which we customarily think that the state is in the habit of distributing to all?

Therefore, although an individual's right to an education may not be a fundamental right in the strictest constitutional sense, in the final analysis, it is undeniable that an adequate education is indispensable to any individual, as well as to the well-ordered society to which he belongs, if he is to be afforded an opportunity to truly understand, appreciate and act upon principles which have themselves been held to be constitutionally fundamental.

III. ACTS 194 AND 195 ATTEMPTED TO EQUALIZE THE DISPARITY BETWEEN PUBLIC AND NONPUBLIC SCHOOLS THAT HAD EXISTED PRIOR TO THEIR ENACTMENT.

Acts 194 and 195 amended the Pennsylvania Public School Code of 1949 (24 P.S. Secs. 1-101 to 27-2702) by authorizing the Department of Education to provide certain educational

benefits to non-public school students *which had already been provided to public school students*. Act 194 authorized a variety of "auxiliary services" and Act 195 authorized textbooks as well as a variety of "instructional equipment" and "instructional materials".[2] Under various sections of the Pennsylvania Public School Code, the Commonwealth had already been providing such auxiliary services, as well as similar textbooks and instructional equipment and materials, to pupils attending public schools.[3]

The consequence of the aid provided by these Acts was to obviate the necessity for a Commonwealth student to decide whether his religious training would be sacrificed in order to acquire the maximum educational benefits otherwise available to him in the public educational system. This, in turn, would unburden him in the free exercise of his religion.

As previously discussed, although the right to an education may not be a specifically guaranteed constitutional right, its fundamental role in our society is indubitable. The Pennsylvania General Assembly most certainly recognized the need to adequately educate *all* children within the Commonwealth.

The Legislative Findings & Declaration of Policy for both Acts 194 and 195 contain the following expression: "The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities." That the General Assembly considered the furtherance of education as valid state interest, as matter of public welfare, is therefore clear.

Inasmuch as approximately one-quarter of all children in the Commonwealth attend non-public schools, the intent of the General Assembly in enacting Act 194 was to assure the providing of such auxiliary services in such a manner that every school child in the Commonwealth could equitably share in the benefits thereof. A parallel expression of intent—to confer the benefits of text-books and instructional materials upon all such children, and not merely public school children—was expressed by the

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[2] The precise nature of such services and materials has been cited in the Motion to Affirm filed by Appellee Chesik, et al., p. 4, as well as elsewhere in the records and shall not be repeated herein in any detail.

[3] See, e.g., 24 P.S. Sec. 9-951-9-971 and Sec. 8-801,8-807.1.

General Assembly in regard to Act 195, intending that *all* students within the Commonwealth share in these added educational benefits.

It is extremely important to take note of the fact that the General Assembly itself recognized that non-public Schools could be relied upon to provide the secular facets of education within the state. Although Acts 194 and 195 did not become law until July 12, 1972, the General Assembly of Pennsylvania had much earlier recognized the need to equalize the educational benefits available to public and non-public school students. The Pennsylvania Constitution formerly provided: "The General Assembly shall provide for the maintenance and support of a thorough and efficient *system of public schools*, wherein all the children of the Commonwealth above the age of six may be educated."[4] (Emphasis added). In 1967, this provision was reworded and now reads: "The General Assembly shall provide for the maintenance and support of a thorough and efficient *system of public education* to serve the needs of the Commonwealth."[5] (Emphasis added). Still later, the legislature declared that:

> "the government *duty* to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those purely secular educational objectives achieved through non-public education. Pa. Stat. Ann. Tit. 24, Sec. 5602(3) (1968). (Emphasis added)

IV. THE NEW EQUAL PROTECTION STANDARD REQUIRES THAT THERE BE A "COMPELLING" STATE INTEREST TO JUSTIFY ANY CLASSIFICATION SCHEME THAT PLACES AN UNDUE BURDEN UPON THE EXERCISE OF A CONSTITUTIONALLY "FUNDAMENTAL" RIGHT.

A. The New (Substantive) Equal Protection Standard

In his concurring opinion in the case of *San Antonio Independent School District v. Rodriguez*—U.S.—93 S.Ct. 1278—

[4] Penn. Const. Art. X, Sec. 1 (1966).
[5] Penn. Const. Art. III, Sec. 14 (1967).

U.S.—36 L.Ed. 2d 16 (1973), Mr. Justice Stewart observed that the Equal Protection Clause created no "substantive rights" or liberties, but rather that the function of the Equal Protection Clause, is simply to "measure the validity of classifications" appearing in state laws. The traditional Equal Protection Clause analysis rested upon the basic presumption of the constitutional validity of a duly enacted state (or federal) law, and the measure applied in such cases was the standard that classifications, if they existed, must have been reasonable, not arbitrary, and must have rested upon grounds not wholly irrelevant to the achievement of the state legislature's objective in having enacted such a law. Insofar as any classification, by definition, entails some degree of inequality of treatment, the test could not have been whether the law in question affected some individuals differently from others. Rather, the measure of reasonableness of a classification required only that those who were similarly situated were treated similarly.

During Chief Justice Warren's final Term, the Court handed down its decision in *Shapiro v. Thompson*, 394 U.S. 618 (1969), in which it was held that state-imposed residence requirements in welfare laws were unconstitutional insofar as such requirements placed an undue burden on the constitutionally guaranteed right to travel among the states. In upholding the Equal Protection Clause argument put forth therein the Court applied its most developed formulation statement of the so-called 'new equal protection': statutory classifications which are wholly arbitrary or capricious ("invidious") or which are based upon "suspect criteria" and classifications which adversely effect "fundamental rights" will be held to be violative of the Equal Protection Clause unless they are justified by a "compelling" state interest.[6]

Although Mr. Justice Harlan dissented in *Shapiro*, he nonetheless carried the new equal protection type analysis to a more refined level by analyzing the compelling interest doctrine into its two "branches": The "suspect criteria" standard and the

[6] Compare this to the less strict traditional standard earlier expressed by Chief Justice Warren: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived of to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426.

"fundamental right" standard. Moreover, as Mr. Justice Harlan noted in his dissent, these "branches" are not necessarily mutually exclusive, for when the statutory classification is grounded precisely upon the exercise of a "fundamental" right both "branches" of the compelling interest doctrine may be shaken.

The Equal Protection problem inherent in this Court's determination of the constitutionality of Pennsylvania Acts 194 and 195 will most certainly encompass both "branches" of the new equal protection doctrine. It will involve the "fundamental right" standard insofar as it has been argued that unless Acts 194 and 195 are upheld an undue burden shall be placed upon the constitutionally fundamental Free Exercise rights of students in the Commonwealth; it will involve the "suspect criteria" standard inasmuch as distinctions have been made in the two basic ways in which Commonwealth students have carried out this Free Exercise right, i.e., by attending public school or by attending non-public, religious schools.

The difficulty in presenting an equal protection analysis of the instant case is that it is herein being argued that it is the *failure to uphold* Acts 194 and 195 that will result in denial of equal protection to those benefitting under these statutes. This twist in analysis results from the fact that prior to the enactment of 194 and 195 those choosing to attend non-public schools had suffered quite severe restrictions upon their fundamental right to pursue their religion. In this sense Acts 194 and 195 are remedial in nature, and thus the starting point in appreciating the thrust of an equal protection argument is in realizing that it was the precise absence of these statutes that had constituted and perpetuated unequal treatment under the laws.

B. The New Equal Protection Standard as Applied to Acts 194 and 195

From the Appellees' point of view, Acts 194 and 195 can be seen to be an effort to equalize educational opportunities between public and non-public institutions. In remedying the preexisting inequities, these Acts served three distinct constitutional ends. By allowing a parochial school student to attend a reli-

gious-affiliated school and at the same time be exposed to the maximum in educational benefits which the Commonwealth has to offer, these Acts have: (a) unburdened the student as to his need to choose whether he would sacrifice his *pursuit of religion* in order to achieve the maximum secular education the state could offer; (b) benefitted every child in the Commonwealth by providing a *broad-based education system* to facilitate exercise of the right to an education; and (c) furthered the valid state interest and public welfare of *educating all Commonwealth children* in the most mutually satisfying manner.

Therefore, unless a "compelling" state interest can be shown as to why these benefits should be forsaken, the new equal protection standard would dictate the upholding of Acts 194 and 195.

V. THE OPPONENTS TO ACTS 194 AND 195 HAVE SUGGESTED THAT THESE ACTS WOULD FAIL TO MEET THE NON-ENTANGLEMENT STANDARD SET FORTH IN THE CASE OF LEMON V. KURTZMAN AND THAT THE ACTS WOULD CONSTITUTE A SUBSIDY TO RELIGIOUS SCHOOLS IN VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT: NEITHER OF THESE CONTENTIONS HAVE BEEN ESTABLISHED AND NEITHER WOULD BE "COMPELLING" ENOUGH TO FORSAKE THE BENEFITS ACCRUING UNDER ACTS 194 AND 195.

A. Acts 194 and 195 Meet the Requirements of Lemon v. Kutrzman and Related Cases.

Appellees Chesik, et al., in their Motion To Affirm have completely and succintly outlined the manner in which these Acts do in fact meet the requirements set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971, *PEARL v. Nyquist*, 413 U.S. 756 (1973), *Sloan v. Lemon*, 413 U.S. 825 (1973) and related cases. They have met this burden and for purposes herein Amicus adopts and supports their arguments.

B. If the Requirements in Lemon v. Kurtzman Have Been Met Then It Follows That These Acts Are Not Violative of the

Establishment Clause of the First Amendment; Moreover, the Establishment Clause Ought Not Supersede This Legislation In Any Event Insofar As the Free Exercise Clause Would Become Re-encumbered.

Even if it is assumed for the sake of argument that the Acts in question did serve to somewhat erode the "wall" between church and state, the question still remains unanswered as to whether the preservation of this wall of separation would be an interest of the state sufficient in magnitude to justify relinquishing the benefits accruing to non-public school children, as well as the Commonwealth as a whole, thereunder. In addition, it has already been indicated that these Acts have operated in a direct and beneficial way in regard to the right to pursue one's religious beliefs and in the regard to the right to acquire an education.

This Court, therefore, is faced with the task of trying to balance the interests of the state in safe-guarding the wall between itself and religion and the interests of the state in providing an education to *all* of its children, whether they are attending public or non-public institutions. It would seem difficult indeed to deny that the separation of church and state is a constitutional principle which finds its roots in the beginning of our constitutional history, but it would be just as difficult to deny that the freedom to worship as one pleases is a constitutional principle of no less force. Therefore, in tipping the scale in favor of the latter of these rights it is necessary to show that the reasons therefor are somehow more "compelling".

The first and most persuasive argument favoring the free exercise of religion can be found in the presently developing concept of "substantive" equal protection, a notion which, in its simplest terms, calls for the Judiciary to infuse into the concept of 'equal protection' the rights, values and benefits which have long been needed, yet wanting.

There have been and continue to be classifications which, although they are not irrational in the traditional equal protection sense, are nonetheless unconstitutional, or ought to be considered so, in that they create or perpetuate inequities that are simply unacceptable within the principled framework of this

country. In such cases, the new equal protection concept, being 'substantive' in nature—as compared to the empty conundrum of traditional equal protection standards, demands a higher burden of justification than the test of mere rationality.

This rationale appeared to be the thrust of Mr. Justice White's dissent, in which he was joined by The Chief Justice, in the case of *Luetkemeyer v. Kauffman*, No. 73-1612, decided October 21, 1974. Is it not the precise point of this developing sense of equal protection that there may well be an affirmative duty upon the state to provide the benefits of public welfare legislation on a state-wide scheme, so as to include those in non-public institutions who have, for traditional equal protection reasons, been denied such benefits?

In *Everson v. Board of Education*, 330 U.S. 1 (1974), this Court upheld a state statute authorizing local school districts to provide bus transportation for parochial students. The purpose of such legislation was to guarantee, as well as the state could, that school children reached the class-room in a safe and expeditious manner. In *Board of Education v. Allen*, 392 U.S. 236 (1968), this Court upheld a state statute authorizing the free loan of secular text-books to all students within the state, including those attending parochial institutions. The purpose of such legislation was to guarantee that all students had access to such materials. In *Lemon v. Kurtzman*, 403 U.S. 602 at 616 (1971), this Court recognized its previous position in upholding a state's providing free school lunches as well as a variety of health services to all students within a state. Why, then, should this Court even hesitate to uphold Pennsylvania Acts 194 and 195? The General Assembly has acknowledged that it is a matter of general welfare that all students in the Commonwealth receive an adequate education. Are children who attend non-public schools—whether such schools are secular in nature or parochial —any the less entitled to those benefits which the legislature has already bestowed upon those children attending public institutions?

It would seem, to paraphrase Mr. Justice White, that absent a showing that there is a valid state interest—let alone a "compelling" one—supporting different treatment between those

children attending public schools and those attending non-public schools, such classification would violate equal protection principles. Moreover, it would most certainly seem legitimate to suggest that the state would in fact become the 'adversary' of religion if such classification were maintained. Therefore, unless the state were to undertake some form of affirmative action—such as legislation in the form of Acts 194 and 195—it would be acquiescing in a state of affairs that would place an undue burden upon non-public school students both in their exercise of religion and in their right to an adequate education. In short, is the state not more "compelled" to remedy the pre-existing inequalities of public vis-a-vis non-public education than it is to strike down beneficial legislation, such as the Acts in question, in the name of the Establishment Clause?

CONCLUSION

The Acts in question represent an attempt by the General Assembly of Pennsylvania to remedy a long-standing inequality of educational benefits between public and non-public education. These statutes provide services to non-public students, *not schools,* only to the extent that such services are already available to public school students. The State of Pennsylvania has not singled out any particular section of citizens so as to bestow a special economic benefit, or any other form of benefit. On the other hand, if these Acts are struck down, non-public school students will again find themselves second-class citizens, burdened by the unconstitutional choices affecting their education which they have been forced to cope with in the past. It is respectfully urged that this Court affirm the decision now on appeal from the District Court below.

Respectfully submitted,

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